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In The
Supreme Court of the United States

THE PINEY RUN PRESERVATION ASSOCIATION,

Petitioner,

v.

THE COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Should this Court address for the first time an important question of federal law concerning the parameters of "diligent prosecution" under the Clean Water Act in a case where the Fourth Circuit held that a consent judgment between the Maryland Department of the Environment ("MDE") and Carroll County, Maryland constituted "diligent prosecution" of the County's violations of the Clean Water Act even though the consent judgment permitted the County to violate the terms of its existing discharge permit until such time in the future that MDE ruled on the County's request for a more lenient permit?

LIST OF PARTIES TO THE PROCEEDING

The caption of the case includes all parties to the proceeding in the district court and court of appeals.

CORPORATE DISCLOSURE STATEMENT

The Petitioner, The Piney Run Preservation Association, is a § 501(c)(3) not-for-profit corporation. It has no parent corporation and is not owned, wholly or in part, by any publicly-traded corporation

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CITATION TO OFFICIAL, UNOFFICIAL REPORTS OF OPINIONS/ORDERS

The opinion of the United States Court of Appeals for the Fourth Circuit in *The Piney Run Preservation Association v. The County Commissioners of Carroll County, Maryland*, is published at 523 F.3d 453 (4th Cir. 2008). The opinion of the district court, Civil No. AMD 06-3019, is unpublished.

JURISDICTION STATEMENT

On April 23, 2008, the United States Court of Appeals for the Fourth Circuit decided *The Piney Run Preservation Association v. The County Commissioners of Carroll County, Maryland*, 523 F.3d 453 (4th Cir. 2008). The court of appeals issued the mandate on May 15, 2008. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

United States Codes

33 U.S.C. § 1251(a), (130a)
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Maryland Regulations

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STATEMENT OF THE CASE

This Clean Water Act ("CWA") case concerns the discharge of thermally-polluted effluent from a sewage treatment plant into the headwaters of the Piney Run, a trout stream in Maryland. At the discharge point, the quantity of the effluent dominates the stream's small base flow. The County Commissioners of Carroll County, Maryland ("County") own and operate the sewage treatment plant ("Plant"). The Petitioner, the Piney Run Preservation Association ("Association"), is a group of landowners who reside downstream from the Plant.

On January 21, 2004, the Maryland Department of the Environment ("MDE") issued to the County a modified National Pollutant Discharge Elimination System ("NPDES") permit after almost ten years of administrative litigation concerning the terms of the permit.[1]

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[1] During this time, Petitioner also litigated a CWA citizens suit based on the County's former permit. *The Piney Run Preservation Assoc. v. County Commissioners of Carroll County, Maryland*, 268 F.3d 255 (4th Cir. 2001). There, the Fourth Circuit applied the "permit shield" defense to the Association's allegations of violations under the permit and vacated the district court's judgment against the County. *Id.* at 269-72. The circuit court found standing to sue on the part of the Association, *Id.* at 264, and did not disturb the district court's findings regarding harm to stream. *See generally, Id.*

During the administrative litigation, the parties offered competing evidence regarding the effects of the thermal pollution on the stream. The modified permit prohibits the County from discharging effluent warmer than the higher of 20°C (68°F) or the ambient temperature of the stream. The County's discharge of the thermally-polluted effluent violates the terms of its NPDES permit during the warm-weather months.

On July 9, 2004, the County applied to MDE for an alternate effluent limitation to increase the temperature limit so that it could comply with its permit without changing its practices. The County's application for an alternate effluent limitation is still pending before MDE.

On July 12, 2004, the Association sent a 60-day notice to the County under the citizen suit provision of the CWA, Section 505(b), 33 U.S.C.A. § 1365(b). In that notice, the Association alleged that the County was violating the temperature limit in its permit. Under the statute, the Association could bring suit against the County if the government was not "diligently prosecuting" the violations by September 13, 2004. On August 13, MDE recorded a request by the County that MDE file a suit against it and enter into a consent decree regarding the discharge of heated effluent. (129a.)

On September 13, 2004, MDE sued the County alleging violations of the temperature limit and monitoring and reporting provisions of the NPDES permit. As requested by the County, MDE

also consented to a stay of its enforcement action. The stay expired on November 20, 2005. (21a).

On August 3, 2006, MDE and Carroll County entered into a Consent Judgment, thereby settling MDE's enforcement action. The Consent Judgment acknowledged that the County had applied for an alternate effluent limitation. The Consent Judgment included four basic components. First, it required the County to pay $13,500 for its violations prior to the date of the Consent Judgment. (24a-25a, 47a). Second, it required the County to design and implement an "Environmental Project." This work provides mitigation for temperature increases in the Piney Run caused by storm water runoff or modifications to stream buffers. (27a-30a). No part of the "Environmental Project" reduces the temperature of the effluent that comes out the discharge pipe. Third, the Consent Judgment provided that penalties of $500 per day would accrue during the pendency of the County's application for an alternate effluent limitation but that the County need only pay those penalties if "MDE or a final judgment does not approve the alternate effluent limit." (26a). Fourth, if a final judgment disapproves the alternate effluent limit, the County will then have 300 days from that judgment to "implement the measures necessary to comply with the thermal limitations of the Permit." (26a). The County is only required to meet the terms of its current NPDES permit if MDE denies the pending application for alternate effluent limitation. Thus, the Consent Order delays the requirement that the

County comply with the permit until some unknown date in the future. Indeed, the County has violated the temperature limit every year since MDE issued the permit in 2004.

On August 25, 2006, in response to the Consent Judgment, the Association sent a second 60-day notice to the County regarding violations of the NPDES permit. The Association alleged that "the consent judgment does not constitute diligent prosecution of Carroll County's violations of the Clean Water Act." (126a). On November 14, 2006, the Association filed a CWA citizen suit against the County in the United States District Court for the Northern District of Maryland pursuant to Section 505 of the Clean Water Act ("the Act"), 33 U.S.C. § 1365. The Association's complaint also specifically alleged that the Consent Judgment entered into between MDE and the County did not constitute diligent prosecution of the County's CWA violations. (70a).

The County moved to dismiss the Complaint and argued that 33 U.S.C. § 1365(b)(1)(B) barred the Association's suit because MDE's enforcement action and the resulting Consent Judgment constituted "diligent prosecution." The Association argued that the Consent Judgment did not require the County to comply with the temperature limits of its NPDES permit and thus could not constitute diligent prosecution of those violations. On March 15, 2007, the district court granted the County's motion to dismiss.

The Association appealed. The United States Court of Appeals for the Fourth Circuit affirmed. The court of appeals issued its judgment on April 23, 2008.

REASONS FOR GRANTING THE PETITION

This Court should address for the first time the limits of the diligent prosecution bar to citizen suits under the Clean Water Act.

The CWA prohibits the discharge of pollutants into navigable waters of the United States without a permit. 33 U.S.C. § 1362(12)(A). The CWA's citizen suit provision, Section 505, 33 U.S.C.A. § 1365(a)(1), allows citizens to bring a federal action against a discharger who is discharging pollutants either without a permit or in excess of the limits specified in the permit. The CWA requires such citizens to give the discharger, the state agency, and the United States Environmental Protection Agency 60-days notice of their intent to sue. The CWA conditions subject matter jurisdiction upon the government's failure to "diligently prosecute" the same violations. 33 U.S.C. § 1365(b)(1)(B). This case concerns the parameters of diligent prosecution.

The decision below, *The Piney Run Preservation Association v. The County Commissioners of Carroll County, Maryland*, 523 F.3d 453 (4th Cir. 2008) decided an important question of federal law concerning the limits of the diligent prosecution bar to citizen suits under the Clean Water Act. The Fourth Circuit held that a

consent judgment which permitted the County to violate the terms of its existing NPDES permit until such time as MDE rules on the County's request for a more lenient permit constituted "diligent prosecution." The Association contends that the diligent prosecution bar is not satisfied by a consent decree which gives the enforcement agency an indefinite period of time in which to decide whether the polluter must ever come into compliance with a properly-issued permit. This Court has never addressed the parameters of diligent prosecution under the Clean Water Act. Petitioner urges this Court grant *certiorari* in order to settle the question of what constitutes diligent prosecution.

This Court's jurisprudence on citizen suits under the Clean Water Act consists of six opinions: *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537 (2004); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S. Ct. 693 (2000); *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 112 S. Ct. 1627 (1992); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376 (1987); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615 (1981); *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S. Ct. 1784 (1981).

Two of the six opinions discuss the statutory intent of the CWA citizen suit provision, but they do not explain the parameters of diligent prosecution. In *Gwaltney*, this Court held that citizens should not be permitted to file suit for only past violations "in

order to seek the civil penalties that the Administrator chose to forgo" because such actions would infringe on the Administrator's discretion to enforce the Clean Water Act in the public interest. *Gwaltney*, 484 U.S. at 61, 108 S. Ct. at 383. This Court specifically noted that the statutory language of the citizen suit provision was prospective in nature and substantively similar to the citizen suit provisions of other environmental statutes. *Gwaltney*, 484 U.S. at 57, 108 S. Ct. at 381 (citing Clean Air Act, 42 U.S.C. § 7604; Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972 (1982 ed. and Supp. III); Toxic Substances Control Act, 15 U.S.C. § 2619 (1982 ed. and Supp. IV)). This Court required that citizens make a good faith allegation of ongoing violations in order to satisfy subject matter jurisdiction under the CWA. *Gwaltney*, 484 U.S. at 64, 108 S. Ct. at 385.

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, this Court again held that citizens have standing when violations are ongoing at the time they file suit. *Laidlaw*, 528 U.S. at 187-88, 120 S. Ct. at 707-08. This Court further held that a case is not moot unless the discharging party can make a clear showing that "permit violations could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 193, 120 S. Ct. at 711. Justice Scalia, in his dissent, suggested that the issue of diligent prosecution was still open on remand and opined that citizen suit provision was not intended as an opportunity to second guess the actions of state enforcement agencies. *Laidlaw*, 528 U.S. at 212, 120 S. Ct. at 720 n.4 (Scalia, J., dissenting).

None of the other four cases refers to diligent prosecution. *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537 (2004)(addressing the issue of whether a pumping station requires an NPDES permit); *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 112 S. Ct. 1627 (1992)(addressing whether the federal government has sovereign immunity from liability for fines under the Clean Water Act); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615 (1981)(discussing who may file suit under the citizen suit provision of the Clean Water Act); *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S. Ct. 1784 (1981)(addressing the interplay between federal common law pertaining to pollution nuisances and the newly enacted Clean Water Act). Thus, the Court has never defined the parameters of diligent prosecution in the context of a CWA citizen suit.

This Court has noted the similarities among the citizen suit provisions of various environmental statutes. *See, Gwaltney*, 484 U.S. at 57, 108 S. Ct. at 381; *see also, U.S. Dept. of Energy v. Ohio*, 503 U.S. at 615-16, 112 S. Ct. at 1633-34 (comparing the citizen suit provisions of the Clean Water Act and the Resource Conservation and Recovery Act). This Court has not addressed the parameters of diligent prosecution under the Clean Air Act, the Resource Conservation and Recovery Act, or the Toxic Substances Control Act.

Several circuit courts addressed the parameters of diligent prosecution under the CWA

and afforded the agencies a choice of enforcement methods. In each of these cases, the agency required the polluter to address the alleged violation by a date-certain. *See*, *Karr v. Hefner*, 475 F.3d 1192, 1194, 1197 (10th Cir. 2007) (noting that an agency's prosecutorial strategy does not have to mirror the citizen suit to establish diligence, but further noted that the consent decree did enjoin further CWA violations); *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994) (finding that a consent agreement does not fail to be diligent prosecution merely because a compromise was reached, especially when the evidence presented shows that the polluter had "to correct the violations," a compliance and reporting schedule was imposed, and monetary penalties were assessed); *North and South Rivers Watershed Ass'n, Inc. v. Town of Scituate,* 949 F.2d 552, 554-55, 558 (1st Cir. 1991) (stating that citizen suits are not appropriate "[m]erely because the State may not be taking the precise action Appellant wants it to or moving with the alacrity Appellant desires," and holding that the state enforcement agency established diligent prosecution where the consent agreement established a definite timeline for compliance and "[t]he record show[ed] the town [ ] complied with a variety of mandatory and ongoing tasks"). Further, where an enforcement agency has brought suit, courts have presumed diligence. *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004) (noting that "diligence on the part of the [enforcement agency] is presumed."); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services*

(TOC), Inc., 890 F. Supp. 470, 487 (D.S.C. 1995) (noting the same).

However, federal courts addressing diligent prosecution have also recognized limits to the amount of deference owed to the enforcement agency. Most recently, the Fifth Circuit, in *Environmental Conservation Organization v. City of Dallas*, ___ F.3d ___, 2008 WL 2174066 at 7 (5th Cir 2008), stated, "[i]f a citizen-suit plaintiff demonstrates that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the government-backed consent decree, then a less-than-diligent prosecution might have been shown." The Court of Appeals for the Seventh Circuit has recognized that "a diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it settled regarding their intent with respect to the effect of the settlement." *Friends of Milwaukee's Rivers*, 382 F.3d at 760. Indeed, several district courts have held that any presumption of deference paid to the enforcement agency can be rebutted upon a showing that the agency "has engaged in a pattern of conduct in its prosecution that could be considered dilatory, collusive or otherwise in bad faith." *Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 183 (D. Conn. 1991) (quoting *Connecticut Fund For Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986), *aff'd in part, rev'd in part*, 989 F.2d 1305 (2d Cir. 1993); *see also Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1579 (N.D. Ga. 1995) (holding that an agency's failure to require

compliance with effluent levels in an NPDES permit was a mere extension of deadlines and not diligent prosecution).

In each of these cases, the governmental prosecution of the violations addressed the quality or nature of the actual discharge. *Friends of Milwaukee's Rivers*, 382 F.3d at 750-51 (noting that the stipulation required the discharger to spend $907,000,000.00 and established a schedule to establish compliance with the CWA); *Environmental Conservation Organization*, 2008 WL 2174066 at 2, 8 (providing that the consent decree which set forth penalties, a compliance time table, and reporting requirements "resolved" all CWA violations); *Remington Arms Co.*, 777 F. Supp. at 176, 187 (noting that the state enforcement agency ordered "that Remington cease the discharge of lead shot to the waters of the State of Connecticut" and that defendant had closed its gun club and kept it closed); *but see Culbertson*, 913 F. Supp. 1572, 1576 (finding a lack of diligent prosecution where the state enforcement agency had obtained a judgment requiring the discharger to "either comply with the copper and zinc effluent limitations of the [NPDES] permit, or submit a final report proposing site-specific effluent limitations" and further extended deadlines). In contrast, the Fourth Circuit's ruling below held for the first time held that a consent agreement that does not require the polluter to change the characteristics or quality of the actual discharge can constitute diligent prosecution.

Here, the Court is squarely presented with a case with a concise record which will allow this Court to efficiently address, for the first time, the parameters of the "diligent prosecution" bar to citizen suits. The Association respectfully requests that this Court grant *certiorari* to determine whether a consent decree which does not require the polluter to change its conduct regarding ongoing violations should bar a citizen suit. A decision by the Court on this issue would guide litigants and courts in cases under the CWA and other environmental statutes with similar provisions.

CONCLUSION

This petition presents an opportunity for this Court to clarify the limits of the diligent prosecution bar to citizen suits under the Clean Water Act and other federal environmental statutes. This Court has not previously addressed this matter, and the Association respectfully requests that this Court grant certiorari to review this case.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE PINEY RUN PRESERVATION ASSOCIATION,

Plaintiff-Appellant, No. 07-1348

v.

THE COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Andre M. Davis, District Judge.
(1:06-cv-03019)

Argued: January 29, 2008

Decided: April 23, 2008

Before GREGORY and SHEDD, Circuit Judges, and Patrick M. DUFFY, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge Shedd wrote the opinion, in which Judge Gregory and Judge Duffy joined.

COUNSEL

ARGUED: Guerdon Macy Nelson, Towson, Maryland, for Appellant. Linda S. Woolf, GOODELL, DEVRIES, LEECH & DANN, L.L.P., Baltimore, Maryland, for Appellee. **ON BRIEF:** Paul N. DeSantis, Towson, Maryland, for Appellant. K. Nichole Nesbitt, Joseph B. Wolf, GOODELL, DEVRIES, LEECH & DANN, L.L.P., Baltimore, Maryland, for Appellee.

OPINION

SHEDD, Circuit Judge:

Piney Run is a small stream with its headwaters near the border of Carroll and Baltimore counties in Maryland. For the second time, the Piney Run Preservation Association ("the Association") has filed a citizen suit under the Clean Water Act ("CWA" or "the Act") alleging that the County Commissioners of Carroll County ("the County") are violating the CWA by discharging treated wastewater (*i.e.*, effluent) from the Hampstead Wastewater Treatment Plant ("the Plant") into Piney Run. The Association specifically contends that the temperature of the discharged effluent at times exceeds the thermal limitation set forth in the County's National Pollutant Discharge Elimination

System ("NPDES") permit.[1] On the County's motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the district court found that the Maryland Department of the Environment ("MDE") was "diligently prosecuting" a CWA enforcement action against the County for violating the Permit; consequently, the court held that the Association was barred by 33 U.S.C. § 1365(b)(1)(B) from maintaining this suit.[2] The Association now appeals the order of dismissal, arguing that the district court erred in its "diligent prosecution" determination. We affirm.

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[1] The prior CWA litigation between these parties also centered on the temperature of the Plant's discharged effluent. In that case, the district court held that although the County's permit (as it then existed) did not contain a thermal limitation, the County was nonetheless liable under the CWA. Consequently, the court enjoined the County from further CWA violations and assessed civil penalties of $400,000 against it. We vacated the judgment on appeal, concluding (*inter alia*) that the County did not violate the CWA because it "complied with the discharge limitations and reporting requirements of [its] permit" and its effluent discharges "were within the reasonable contemplation of the permitting authority at the time the permit was issued." *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., Md.*, 268 F.3d 255, 259 (4th Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002). As we explain below, the County's permit has been modified since that time to include a thermal limitation for the Plant's discharged effluent.

[2] Section 1365(b)(1)(B) provides that a citizen suit may not be maintained if the government enforcement agency "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right."

I

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. "To serve those ends, the Act prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the Act." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (*quoting* 33 U.S.C. § 1311(a)). One such provision, codified at 33 U.S.C. § 1342, "established a National Pollution Discharge Elimination System . . . that is designed to prevent harmful discharges into the Nation's waters." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2525 (2007). "Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *Miccosukee Tribe*, 541 U.S. at 102. An NPDES permit "defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the [Act]." *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976). "The Environmental Protection Agency (EPA) initially administers the NPDES permitting system for each State, but a State may apply for a transfer of permitting authority to state officials. If authority is transferred, then state officials . . . have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight." *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2525 (citations omitted). The State of Maryland is authorized to administer the

NPDES program and does so through MDE. *See Piney Run Pres. Ass'n*, 268 F.3d at 265.

"Although the primary responsibility for enforcement rests with the state and federal governments, private citizens provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting Clean Water Act violations." *Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs*, 504 F.3d 634, 637 (6th Cir. 2007). Specifically, § 505(a) of the CWA, 33 U.S.C. § 1365(a), authorizes citizens "to bring suit against any NPDES permit holder who has allegedly violated its permit." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000) (en banc). We have recognized that this citizen suit provision is "critical" to the enforcement of the CWA, *see id.*, as it allows citizens "to abate pollution when the government cannot or will not command compliance," *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987). However, citizen suits are meant "to supplement rather than to supplant governmental action," *id.* at 60, and the CWA — specifically § 1365(b)(1)(B) — "bars a citizen from suing if the EPA or the State has already commenced, and is 'diligently prosecuting,' an enforcement action," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 175 (2000). This "statutory bar is an exception to the jurisdiction granted in subsection (a) of § 1365, and jurisdiction is normally determined as of the time of the filing of a complaint." *Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207, 208 (4th Cir. 1985).

II

As we explained in the prior CWA litigation between these parties, MDE has classified Piney Run as a Class III-P stream, meaning that it is protected as a source of public drinking water and as a body capable of supporting a self-sustaining trout population. The Plant is subject to the CWA and since 1975 has operated under a series of NPDES permits granted by MDE, the most recent one having been issued in 1990. That permit contains express limitations on the amount of certain pollutants that the Plant can discharge, but heat — which is a statutory pollutant — was not originally listed in it. *See Piney Run Pres. Ass'n*, 268 F.3d at 260-61.

In March 2000, as part of ongoing administrative litigation involving the Plant, MDE modified the County's permit to include a thermal limitation for the Plant's discharged effluent and procedures for measuring ambient conditions in Piney Run. The thermal limitation provides that the effluent cannot exceed the higher of 20°C or the ambient temperature of the stream. Following contested proceedings before an administrative law judge, the modified permit became effective in early 2004. Several months later, the County applied to MDE for an alternate effluent level ("AEL") — *i.e.*, a less stringent temperature restriction — and submitted a Study Plan for Alternate Effluent

Limitation for MDE's review.[3] During the pendency of this application, the County has provided MDE with supplemental reports and appears to have cooperated with MDE. MDE has not yet made a final determination on this application.

Apart from its AEL application, the County petitioned the state circuit court for review of MDE's decision to modify the 1990 permit. The County also moved to stay enforcement of the modified permit pending the outcome of the petition for review. In turn, MDE filed a complaint seeking injunctive relief and civil penalties against the County for, *inter alia*, violating the thermal limitation in the modified permit ("the MDE enforcement action"). Eventually, the circuit court denied the County's petition for judicial review, but it stayed enforcement of the modified permit until a final decision was rendered on the County's petition for review or November 20, 2005, whichever came first. In light of the circuit court's stay of enforcement of the modified permit and the County's appeal of the denial of its petition for review, MDE and the County jointly moved the

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[3] The applicable regulation provides:

> Thermal discharge effluent limitations or standards established in permits may be less stringent than those required by applicable standards and limitations if the discharger demonstrates to the satisfaction of the Department that the effluent limitations or standards are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is made.

Md. Code Regs. 26.08.03.03E(1).

circuit court to stay the MDE enforcement action until the stay of the modified permit was lifted. The circuit court granted the joint motion and stayed the MDE enforcement action. On November 20, 2005, the stay of enforcement of the modified permit expired, and that permit again became effective. Subsequently, MDE's final decision modifying the permit was judicially affirmed.[4]

In July 2006, MDE and the County entered into a Consent Judgment in the MDE enforcement action reflecting their "agreement as to appropriate long-term and interim measures to insure compliance with the Permit." J.A. 373. The circuit court entered the Consent Judgment on July 25, 2006, and its terms became the order of the circuit

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[4] The primary point of contention concerning the appropriate thermal limitation centers on the effect of the discharged effluent on the Piney Run trout population, and the parties dispute that effect. According to the County, the Plant's purification process does not involve heating the effluent; rather, it consists of biological and ultraviolet light treatment. Nonetheless, at times the ambient temperature of outdoor air and sunlight exposure can affect both the temperature of the stream and of the effluent before it is discharged. When this occurs, the daytime temperature of the stream often exceeds the effluent; however, at night, the stream cools faster than the stored effluent, causing the effluent to exceed the ambient temperature of the stream. Interestingly, in affirming the administrative decision to modify the permit, the Maryland Court of Special Appeals noted that the administrative law judge found "that there was no evidence the Plant's discharge had any adverse effect on aquatic life that naturally occurring conditions would not have" and that he also indicated that "the discharge may even have a positive effect on the trout population." *Cty. Comm'rs of Carroll Cty. v. Rowland*, No. 2338, at 30 (Md. Ct. Spec. App. 2006) (J.A. 415).

court. *See Long v. State of Md.*, 807 A.2d 1, 7 (Md. 2002) (noting that consent judgments have the same force and effect as other judgments).

The Consent Judgment initially mandates that upon its effective date, the County "shall achieve compliance with the thermal effluent limitations" set forth in the modified permit. J.A. 374. It also provides that in settlement of all violations of the thermal limitation that occurred between November 20, 2005, and July 25, 2006, the County would pay a civil penalty of $500 for each day that a violation occurred. Pursuant to this provision, the County paid penalties in the amount of $13,500.

Prospectively, the Consent Judgment also imposes stipulated civil penalties of $500 for each day that the County fails to: (1) comply with the thermal limitation of the modified permit; (2) meet any requirement or complete any required work, plan, or report; or (3) adhere to any required milestone date or schedule. In recognition of the County's AEL request and implementation of an AEL study, the Consent Judgment provides that the stipulated penalties automatically begin to accrue on the day after performance by the County is due or the day a violation occurs, whichever is applicable, and will continue to accrue until the County satisfactorily completes performance or the violation ceases. If MDE approves an AEL and that approval is thereafter challenged, then stipulated penalties will continue to accrue; however, if a final judgment is entered approving an AEL, then stipulated penalties for events that do not exceed the AEL will

not be assessed by MDE. Conversely, if an AEL is ultimately disapproved, then stipulated penalties from November 20, 2005, to the date of the final AEL judgment will become due and payable within 30 days from the final judgment date. Additionally, upon final disapproval of an AEL, the County will be required to submit to MDE a plan identifying the measures needed to comply with the thermal limit of the modified permit, and the County will thereafter have 270 days to implement those measures.[5] During that 300-day period, stipulated penalties will continue to accrue for violations of the thermal limitation.

The Consent Judgment also requires the County to implement a multi-phase Environmental Project ("EP") to "mitigate any water temperature increases caused by storm water runoff or modifications to stream buffers in the Piney Run watershed," J.A. 376, and it imposes on the County various obligations and deadlines associated with the EP. According to MDE, "implementation of the EP may result in reduced temperature impacts and related environmental benefits to the Piney Run watershed." J.A. 268.

In late August 2006, the Association's counsel notified the County and MDE by letter of its intent

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[5] In the event that an AEL is disapproved, it appears that the County's planned means of compliance with the thermal limitation is the installation of mechanical chillers that will cool the effluent before its discharge. The County has been reluctant to utilize chillers based on its concerns that the chillers will impact the area's air and water quality and will cause noise pollution.

to file a citizen suit to seek enforcement of the thermal limitation in the modified permit. The Association thereafter filed this lawsuit in November 2006. The County responded by moving under Rule 12(b)(1) for dismissal, arguing that the Association is barred from maintaining a citizen suit because the MDE enforcement action constitutes diligent prosecution within the meaning of § 1365(b)(1)(B). The district court granted the motion and dismissed the case, finding "that the consent judgment (even though it does not mandate installation of the chillers that are plaintiff's preferred remedy) and its implementation comfortably come within the relevant standards of 'diligent prosecution.'" J.A. 765.

III

We review *de novo* a dismissal under Rule 12(b)(1). *Suter v. United States*, 441 F.3d 306, 310 (4th Cir.), *cert. denied*, 127 S. Ct. 273 (2006).[6] The Association, as plaintiff, bears the burden of proving that subject-matter jurisdiction exists. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). For purposes of this case, this means that the Association bears the burden of proving that MDE has not diligently prosecuted the County's violations of the thermal limitation set forth in the modified permit. A CWA enforcement prosecution will ordinarily be considered "diligent" if the judicial action "is capable of requiring compliance with the Act and is in good faith calculated to do so," and as

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[6] When presented with a Rule 12(b)(1) motion, district courts are permitted to consider materials outside the pleadings, *Suter*, 441 F.3d at 309 n.2, and the parties presented such materials in this case.

the Association acknowledges in its opening brief, diligence is presumed. *See Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004), *cert. denied*, 544 U.S. 913 (2005); *see also Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007) ("Citizen-plaintiffs must meet a high standard to demonstrate that [a government agency] has failed to prosecute a violation diligently."). This presumption "is due not only to the intended role of the [government] as the primary enforcer of the [CWA], but also to the fact that courts are not in the business of designing, constructing or maintaining sewage treatment systems." *Friends of Milwaukee's Rivers*, 382 F.3d at 760 (citation omitted).

"Section 1365(b)(1)(B) does not require government prosecution to be far-reaching or zealous. It requires only diligence." *Karr*, 475 F.3d at 1197. Thus, a citizen-plaintiff cannot overcome the presumption of diligence merely by showing that the agency's prosecution strategy is less aggressive than he would like or that it did not produce a completely satisfactory result. *Id.* Moreover, the fact that an agency has entered into a consent decree with a violator that establishes a prospective schedule of compliance does not necessarily establish lack of diligence. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 318 (1982) (noting that "enforcement actions typically result, by consent or otherwise, in a remedial order setting out a detailed schedule of compliance designed to cure the identified violation of the Act" (internal quotation marks omitted)). Indeed, when presented w. h a consent decree we must be particularly deferential to the agency's expertise, and we "should not interpret § 1365 in a

manner that would undermine the [government's] ability to reach voluntary settlements with defendants." *Karr*, 475 F.3d at 1198. As the Supreme Court has recognized: "If citizens could file suit . . . in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Gwaltney*, 484 U.S. at 61.

The Association argues generally that the district court erred in concluding that MDE has diligently prosecuted the County's CWA violations "because the Consent Judgment . . . provided a benefit to [the] County and failed to ensure that violations would not continue." *Brief of Appellant*, at 18-19. As we have noted, a CWA enforcement action will be considered diligent where it is capable of requiring compliance with the Act and is in good faith calculated to do so. Based on the record before us, we hold that the Association has failed to meet its high burden of establishing that the MDE enforcement action does not satisfy this standard.

In reaching this conclusion, we initially note that it cannot seriously be said that the MDE enforcement action is incapable of requiring compliance with the Act. Indeed, the evidence establishes the contrary. MDE modified the County's permit in 2000 to include the thermal limitation, and the modified permit only became effective in 2004 at the conclusion of contested administrative proceedings. Before then, the County's discharge of effluent did not violate the terms of its NPDES permit. *See Piney Run Pres. Ass'n*, 268 F.3d at 259.

Within several months of the effective date of the modified permit, MDE filed the enforcement action seeking, *inter alia*, injunctive relief requiring the County "to take all steps necessary to comply with all terms and conditions of its NPDES permit, including but not limited to the limitation on temperature." J.A. 325. Although the MDE enforcement action was stayed pending resolution of the County's petition for review of MDE's decision to modify the permit, it culminated in the Consent Judgment. Under the terms of the Consent Judgment, the County is required to comply with the thermal limitation of the modified permit and is subject to monetary penalties for failing to do so. In light of these facts, the MDE enforcement action surely is capable of requiring the County to comply with the Act.

The real question raised by the Association is whether the MDE enforcement action, and specifically the Consent Judgment, is in good faith calculated to require the County's compliance with the Act.[7] In challenging the motivation underlying the MDE enforcement action, the Association points to, *inter alia*, an alleged request by the County for MDE to file the enforcement action, the fact that the daily fine established in the Consent Judgment is lower than the fine imposed in the prior CWA litigation, and the fact that the Consent Judgment

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[7] The Association argues that the presumption of diligence arising from an agency enforcement action can be rebutted "upon a showing that the agency has engaged in a pattern of conduct in its prosecution that could be considered dilatory, collusive or otherwise in bad faith." *Brief of Appellant*, at 21-22 (internal quotation marks omitted).

does not establish a final deadline for compliance. In our view, these matters simply do not establish a lack of diligence on MDE's part.

Even assuming that the County requested MDE to pursue the enforcement action, "there is no incompatibility whatever between a defendant's facilitation of suit and the State's diligent prosecution — as prosecutions of felons who confess their crimes and turn themselves in regularly demonstrate." *Laidlaw Envtl. Servs.*, 528 U.S. at 211 n.4 (Scalia, J., dissenting).[8] Moreover, to the extent that the now-vacated prior fine is relevant, MDE's agreement to accept a lower daily fine in the Consent Judgment appears to be nothing more than a concession on the part of MDE in exchange for other obligations (*e.g.*, the EP) that are imposed on the County. As we have noted, this is precisely the type of discretionary matter to which we should defer. Finally, the Association's complaint about the absence of a final compliance deadline in the Consent Judgment is unavailing for at least two reasons. First, the Consent Judgment requires the County's immediate compliance with the thermal limitation and imposes a daily fine for its violations. Second, the open-ended nature of the Consent

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[8] Although Justice Scalia's dissenting opinion discussed the merits of the diligent prosecution question, the *Laidlaw* majority did not decide the issue. Notably, however, the allegation that Laidlaw played a role in facilitating the enforcement action involved more than a mere request that the agency file suit; instead, as the majority noted, the district court found that "Laidlaw drafted the state-court complaint and settlement agreement, filed the lawsuit against itself, and paid the filing fee." 528 U.S. at 178 n.1 (internal quotation marks omitted).

Judgment reflects the fact that the County is lawfully seeking an AEL through the state administrative process. Depending on the outcome of that process, the County's obligations under the Consent Judgment may change significantly and may include not only payment of any accrued fines but installation of the mechanical chillers. Without legitimate evidence that MDE had no intention of acting responsibly on the County's AEL application, we have no basis to impute an improper motive to MDE in this regard.

IV

Based on the foregoing, we affirm the district court's order of dismissal.

AFFIRMED

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

U.S. COURTHOUSE
101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
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MDDAMDChambers@mdd.uscourts.gov

March 15, 2007

MEMORANDUM TO COUNSEL RE:

The Piney Run Preservation Association v.
County Commissioners of Carroll County
Civil No. AMD 06-3019

Now before the court in this citizen suit instituted under the Clean Water Act is defendant's motion to dismiss for lack of jurisdiction on the ground that the Maryland Department of the Environment is "diligently prosecuting" an enforcement action. No hearing is needed and I have elected to rule in this informal manner.

I have read with keen interest and attention your excellent briefs and the recorded history of plaintiff s admirable efforts to enforce (once and for all time) the CWA in respect to Piney Run. *Piney Run Preservation Ass'n v. Commrs. of Carroll Co.*, 268 F.3d

255 (4th Cir. 2001), *cert. denied,* 535 U.S. 1077 (2002), *rev'g Piney Run Pres. Ass'n. v. County Commrs.,* 82 F. Supp. 2d 464 (D.Md.2000), and *Piney Run Pres. Ass 'n v. County Commrs.,* 50 F. Supp. 2d 443 (D. Md. 1999). *And see Brewster v. Woodhaven Building,* 360 Md. 602, 759 A.2d 738 (2000). Nevertheless, I am satisfied as a matter of law that the consent judgment (even though it does not mandate installation of the chillers that are plaintiff's preferred remedy) and its implementation comfortably come within the relevant standards of "diligent prosecution" and that plaintiff is ousted from its enforcement efforts at this time. *See Community of Cambridge Environmental Health and Community Dev. Group v. City of Cambridge,* 115 F. Supp. 2d 550 (D. Md. 2000).

Accordingly, by separate Order, the motion to dismiss is GRANTED.

Very truly yours,

/s/

Andre M. Davis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE PINEY RUN
PRESERVATION ASSOCIATION

Plaintiff

v.

COUNTY COMMISSIONERS
OF CARROLL COUNTY

Defendant

Civil Action No.: AMD06CV3019

ORDER

Upon consideration of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment and Plaintiffs' Opposition thereto, it is this 15th day of March, 2007 hereby ORDERED that:

1. The motion is GRANTED; and

2. The Complaint is hereby DISMISSED WITH PREJUDICE; and

3. The Clerk is directed to close this case.

/s/
HON. ANDRE M. DAVIS
United States District Judge

IN THE CIRCUIT COURT FOR CARROLL COUNTY, MARYLAND

CASE NO.: 06-C-04-041610

STATE OF MARYLAND
DEPARTMENT OF THE
ENVIRONMENT
1800 Washington Boulevard
Baltimore, Maryland 21230

Plaintiff

v.

COUNTY COMMISSIONERS OF
CARROLL COUNTY
County Office Building
225 North Center Street
Baltimore, Maryland

Defendant

CONSENT JUDGMENT

1. The State of Maryland, Department of the Environment (the "Department" or "MDE"), is empowered pursuant to the powers, duties, and responsibilities vested in and imposed upon the Secretary of the Environment by Environment Article, Sections 1-301 and 9-301 through 9-344, inclusive, Annotated Code of Maryland, to implement and enforce the environmental laws, including water pollution

control laws, of the State of Maryland, and, accordingly, filed this action alleging that:

a. The Department, pursuant to the provisions of Title 9 of the Environment Article, Annotated Code of Maryland, and regulations promulgated thereunder, issued Modification C of State Discharge Permit 88-DP-0594C, NPDES Permit MD0022446 on or about February 1, 2004 ("Permit"), to Carroll County, authorizing a flow increase from 0.5 million gallons per day ("MGD") to 0.9 MGD of sanitary wastewater from the Hampstead wastewater treatment plant into the Piney Run, waters of the State.

b. Special Condition II.A and B, Footnotes (2), (3), and (4) of the Permit, established effluent limitations and monitoring requirements for temperature at the point of discharge identified as Outfall 001.

c. Carroll County moved for a stay of the permit modification until a decision was reached by the Court of Special Appeals regarding the merits of its appeal. The stay request was granted by this Court.

d. The stay expired on November 20, 2005, and as a result, the Permit became effective on that date.

e. When the temperature rises during the summer months, past monitoring data has shown that the temperature of the sanitary

wastewater from the Hampstead wastewater treatment plant will at times exceed the Permit limitation of the higher of 20° C or upstream ambient temperature. Carroll County has reported to MDE that the effluent has exceeded the temperature limitation in the Permit on various dates after the effective date of the Permit beginning on May 30, 2006.

f. Carroll County has designed, but has not installed, chiller equipment and has been issued a permit by the Department to construct the chiller system but has not taken any other measure to reduce the temperature of its sanitary wastewater to a level necessary to satisfy the Permit temperature limit. Pursuant to COMAR 26.08.03.03E, an application for an alternate effluent limitation may be submitted to the Department. If an applicant demonstrates to the Department's satisfaction that the temperature of the wastewater discharged will assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the Piney Run, the Department may approve an alternative effluent limit. Carroll County submitted an application for an alternate effluent limit in connection with its application for a renewal discharge permit, and on, May 9, 2004, submitted a Study Plan for Alternate Effluent limitation for review by the Department. On December 21, 2005, Carroll County submitted its Final Report in connection with its Study Plan to the Department. The Department requested additional information and the County submitted a supplemental report to MDE on May 7, 2006. MDE is currently reviewing

Carroll County's report and the data submitted therewith, and Carroll County's request for an alternate effluent limit remains pending

g. This action is necessary to insure compliance with the terms and conditions of the Permit.

2. The parties have now reached agreement as to appropriate long-term and interim measures to insure compliance with the Permit. In lieu of further litigation in this case, before any testimony has been taken, and without trial or adjudication of any issue of fact or law involved herein, and without this Consent Judgment constituting evidence against or admission by either party to this proceeding or in any other proceeding with respect to any factual or legal issue, and without any admission by Carroll County of any violations of State law and regulations promulgated thereunder, or the Permit, the parties have agreed, in full settlement of this proceeding, to the entry of this Consent Judgment, as provided in Rule 2-612, Maryland Rules of Procedure.

Upon stipulation and consent of the parties and having considered the allegations set forth in the Complaint,

IT IS THIS 25th day of July, 2006, by the Circuit Court for Carroll County, **ORDERED:**

I. CORRECTIVE ACTION

A. Upon the effective date of this Consent Judgment, Carroll County shall achieve compliance with the thermal effluent limitations for Outfall 001 set forth in Special Condition II.A and B., Footnotes (2), (3), and (4), of the Permit.

II. PROGRESS REPORTS

Beginning with the effective date of this Consent Judgment, Carroll County shall submit quarterly progress reports to the Department, including, but not limited to, describing the significant activities and work completed during the previous calendar quarter, summarizing any problems or potential problems encountered, any actions being taken or planned to rectify problems, and projected work for the next reporting period. These progress reports, due no later than the 10th working day of the month following the end of each calendar quarter (e.g. the 10th working day of July, October, etc.), shall be submitted until the obligations under Sections I, III, and IV of this Consent Judgment shall have been completed.

III. ENFORCEMENT/CIVIL PENALTIES/STIPULATED PENALTIES

A. In settlement of all exceedences of the temperature effluent limitations of the Permit that have occurred between the effective date of the Permit (November 20,2005) and the date that this Consent Judgment is signed by the parties, upon written demand by the Department, Carroll County

shall pay, no later than 20 calendar days after such demand by the Department, a separate civil penalty of $500 for each day that a temperature violation has occurred. Payment of civil penalties shall not relieve Carroll County from the obligations imposed by this Consent Judgment or any other statute or regulation, nor shall such payment limit the right of the Department to seek to enforce the terms of this Consent Judgment or any other statute of regulation.

B. Beginning on the day that this Consent Judgment is signed by the parties and continuing until all obligations under Sections I, III and IV have been completed, upon written demand by the Department, Carroll County shall pay, no later than 20 calendar days after such demand, a stipulated penalty of $500.00 for each day Carroll County fails to comply with any temperature effluent limit of the Permit or fails to meet any requirement or complete any work, plan or report or adhere to a milestone date or schedule required by this Consent Judgment. Payment of this stipulated penalty shall not relieve Carroll County from the obligations imposed by this Consent Judgment or any other statute or regulation, nor shall such payment limit the right of the Department to seek to enforce the terms of this Consent Judgment or any other statute or regulation.

C. Where Carroll County has elected to conduct an alternate effluent limit study, it shall pay stipulated penalties as follows:

1. Stipulated penalties shall automatically begin to accrue on the day after performance is due, or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed, or until the violation ceases.

2. If MDE approves an alternate effluent limit and if MDE's approval of the alternate effluent limit is challenged, stipulated penalties shall continue to accrue. However, if the final judgment, if any, approves the alternate effluent limit, then such penalties for events that do not exceed the alternate effluent limit will not be assessed or due and payable to MDE.

3. If MDE or a final judgment does not approve the alternate effluent limit, then the penalties, from the effective date of the Permit (November 20, 2005) to the date of a final judgment, shall be due and payable, and Carroll County shall pay the accrued stipulated penalties within 30 days of such final judgment.

4. Should the final judgment disapprove the alternate effluent limit, then within 30 days of the final judgment, Carroll County shall submit a plan to the Department that identifies the measures to be taken by the County to comply with the thermal limits of the Permit, and within 270 days of the Department's approval of such measures, Carroll County shall implement the measures necessary to comply with the thermal limitations of the Permit. Penalties for violations

of thermal limits shall continue to accrue during this 300-day period.

IV. ENVIRONMENTAL PROJECT

A. To mitigate any water temperature increases caused by storm water runoff or modifications to stream buffers in the Piney Run watershed, Carroll County shall implement an Environmental Project ("EP") in accordance with the provisions of this Consent Judgment. By July 1, 2006, Carroll County shall submit a study plan and schedule for evaluating the thermal effects of storm water released into the Piney Run within Carroll County. Within 30 days of the Department's approval of the study plan and schedule submitted by Carroll County, Carroll County shall begin an evaluation of the storm water management ("SWM") facilities upstream of or in the vicinity of the Plant and the thermal effects of storm water discharged from those facilities to the Piney Run. Upon completion of this evaluation and no later than September 30, 2006, Carroll County shall complete the collection of stormwater management facility based thermal data for evaluation. After evaluation of that information and no later than December 15, 2006, Carroll County shall submit to the Department for review and approval the evaluation, along with a storm water temperature remediation plan based on the findings of the SWM evaluation, an implementation schedule for the remediation plan, and a budget. Carroll County shall modify the storm water management facilities in Carroll County and provide for ongoing

management of storm water in accordance with the remediation plan and schedule, as approved by MDE.

Carroll County has previously planted a riparian buffer on its property along the Piney Run upstream and downstream of its discharge point. During the 2006 planting season, Carroll County shall survey and evaluate the status of the riparian buffers from the headwaters of the Piney Run to Trenton Road, plant and establish a riparian buffer on its property where there is none, enhance any existing buffer with appropriate supplemental plant stock to accelerate effective stream cover, and place the riparian buffer under a conservation easement. By August 1, 2006, Carroll County shall submit a plan to MDE for establishing an effective riparian buffer on its property, indicating the size, quantity, and species of the proposed supplemental stock, the proposed spacing of the trees and dimensions of the buffer. The additional trees will be native species appropriate for the physiographic region.

By September 1, 2006, Carroll County shall submit a plan for establishing a riparian buffer or purchasing easements for establishing, on privately owned property, a riparian buffer along the Piney Run from its headwaters to Trenton Road. The plan shall include a description of an offer by Carroll County to riparian property owners to either 1) establish an effective riparian buffer or 2) purchase of a conservation easement at fair market value for the establishment of an effective riparian buffer. Carroll County shall use best efforts to obtain permission to establish a riparian buffer or to obtain conservation easements for the planting of a riparian buffer from

such landowners. The plan shall include a schedule and budget. The plan may also include any other stream temperature improvement measures the County believes will be effective. Carroll County shall implement the plan and schedule as approved by the Department.

B. Carroll County shall monitor the water temperature of the Piney Run near or at the headwaters of the Piney Run, the County line and Trenton Road before implementation of the SWM evaluation and for a period of five years after implementation of the SWM remediation plan and the riparian buffer plans.

C. Beginning on July 1, 2006, and at the end of every quarter thereafter until the completion of the Environmental Project, Carroll County shall submit documentation of all expenditures incurred in connection with the Environmental Project, accompanied by a certification of the truth and accuracy of each of the following:

1. That all cost information provided to MDE in connection with its approval of the Environmental Project is complete and accurate and represents a fair estimate of the costs necessary to implement the Environmental Project;

2. That except for the requirement to perform the Environmental Project pursuant to this Consent Judgment, Carroll County was not required to perform the Environmental Project by any federal, State or local law or regulation.

D. Within 30 days after the deadline for completion of the Environmental Project pursuant to the plan to be submitted by Carroll County, Carroll County shall submit an Environmental Project completion report to MDE. This report shall contain a detailed description of the Environmental Project as implemented; documentation of expenditures made in connection with the Environmental Project, including an itemized list of all eligible Environmental Project costs; certification that the Environmental Project has been fully implemented; and a description of the environmental benefits resulting from implementation of the Environmental Project.

An Environmental Projects Implementation Schedule that sets forth the deadlines contained in this Section IV is attached as Exhibit A to this Consent Judgment.

E. After receiving the Environmental Project completion report, MDE shall notify Carroll County whether Carroll County has satisfactorily completed the Environmental Project. If the Environmental Project has not been satisfactorily completed in accordance with all schedules, stipulated penalties may be assessed under Section III of this Consent Judgment.

V. PAYMENTS OF PENALTIES

All payments of penalties set forth in Section III ("ENFORCEMENT/STIPULATED PENALTIES") of this Consent Judgment shall be made by check payable to the Maryland Clean Water Fund, and shall be mailed to the Maryland Department of the

Environment, Fiscal Services Division, Cash Receipts/Advances Unit, P.O Box 2057, Baltimore, Maryland 21203-2057.

VI. PERSONS BOUND BY ORDER

This Consent Judgment shall be binding upon the Department and Carroll County and their respective agents, employees, successors and assigns.

VII. NO ADMISSIONS OR WAIVERS

This Consent Judgment is understood and intended by the parties to be without any admission of liability, and nothing in this Consent Judgment shall be considered an admission by any party in this proceedings. Except as provided in Section III ("ENFORCEMENT / STIPULATED PENALTIES") of this Consent Judgment, nothing contained herein shall constitute a waiver of the rights of the Department to proceed in an administrative or civil action for violations of the terms of this Consent Judgment, any other terms or conditions of the Permit, or of applicable statutes or regulations. The Department may bring any action authorized by law to enforce this Consent Judgment, including an action for contempt.

VIII. NOTIFICATION

Unless otherwise specified, reports, correspondence, approvals, disapprovals, notices or other submissions relating to or required by this Consent Judgment shall be in writing and shall be sent to the following:

For the Department:

Robert M. Summers, Director
Water Management Administration
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, Maryland 21230
(410)537-3567

For Carroll County:

Kimberly Millender
County Attorney
225 N. Center Street
Westminster, Maryland 21157
(410) 386-2030

IX. DELAY

If any event occurs which causes or which Carroll County reasonably expects to cause a delay in the achievement of any requirement imposed by this Consent Judgment, Carroll County shall notify the Department, in writing, within ten (10) working days of obtaining knowledge of the occurrence of such event and of its impact on timely compliance. The notice shall identify the cause of the delay, an estimate of the anticipated length of delay, the measures taken and to be taken by Carroll County to prevent or minimize the delay and an estimate of the date by which such measures will be completed. Carroll County shall promptly implement all reasonable measures to prevent or minimize any such delay and to comply with all requirements of the Consent Judgment as soon as

reasonably possible Carroll County may request, in writing, an extension of any deadline for any reason, at least ten (10) working days prior to such deadline. The Department may, at its sole discretion, grant an extension upon such a request. If such an extension is granted, any stipulated penalty, if applicable, shall not accrue.

X. FORCE MAJEURE

A. Carroll County shall perform the requirements of this Consent Judgment in the manner and within the time limits set herein, unless the performance is prevented or delayed by events which constitute a force majeure. Carroll County shall have the burden of proving such a force majeure. A force majeure is defined by any event or circumstance arising from causes not reasonably foreseeable and beyond the control of Carroll County, which cannot be avoided or overcome by due diligence and which delays or prevents performance in the manner or by a date required by this Consent Judgment.

B. Circumstances beyond the control of Carroll County include, without limitation, earthquake, flood or other act of God, war, riot, terrorism, injunction, fire, freight embargo, compliance with any law, rule or order of any governmental body either now or hereafter created that conflicts with the requirements or obligations of tibis Consent Judgment, or strike. Such circumstances do not include increased costs of performance, changed economic circumstances, normal inclement weather, or failure to obtain

federal, state or local permits unless Carroll County has made timely and complete application for such permits.

C. Within ten (10) working days after becoming aware of any event that Carroll County believes constitutes a force majeure, Carroll County shall notify the Department of such event in accordance with Section IX herein ("DELAY"). Failure to comply with the notice provision of this section shall constitute a waiver of Carroll County's right to assert a force majeure claim.

D. If the Department determines that the event or anticipated event which has caused or will cause the delay constitutes a force majeure, the time for performance hereunder shall be extended for an appropriate period of time as determined by the Department, but not less than a period of time substantially equal to the length of the necessary delay, and any applicable stipulated penalty shall not accrue. This shall be accomplished by written approval of the Department.

XI. SUBSEQUENT MODIFICATION

Any modification of the Consent Judgment may be made without approval of the Court but must be in writing and approved by the parties. A party shall not petition the Court for modification without having first made a good faith effort to reach agreement with the other party on such modification.

XII. NOT A PERMIT

This Consent Judgment is not and shall not be interpreted to be a permit or modification of any existing permit. MDE does not, by its consent to entry of this Consent Judgment, warrant . or aver in any manner that Carroll County's complete compliance with this Consent Judgment will result in compliance with the provisions Title 9, Subtitle 3 of the Environment Article, Annotated Code of Maryland, the Clean Water Act or with the discharge permit issued to Carroll County. Notwithstanding MDE's review or approval of any plans, reports, policies or procedures, Carroll County shall remain solely responsible for any non-compliance with the terms of this Consent Judgment, all applicable permits, the Clean Water Act, and State water pollution controllaws and regulations.

Nothing in this Consent Judgment shall be construed to limit any authority of MDE to issue any orders, enforce any applicable orders, or to take any action it deems necessary to protect public health or comfort, or to limit any authority. MDE has or may hereafter de delegated.

XIII. SEVERABILITY

If any provision or authority of this Consent Judgment or the application of this Consent Judgment to any party or circumstance is held by any judicial or administrative authority to be invalid, the application of such provision or

authority to other parties or circumstances and the remainder of this Consent Judgment shall not be affected thereby and shall remain in full force.

XIV. CONTINUING JURISDICTION

This Court shall have jurisdiction to enforce the terms and conditions of this Consent Judgment, to modify the Consent Judgment upon petition of either party, and. to resolve disputes arising under this Consent Judgment.

XV. EFFECTIVE DATE

This Consent Judgment shall become effective as of the date of approval by the Circuit Court for Carroll County and shall remain in force and effect until all obligations and terms referred to in Sections I through V herein have been completed or satisfied.

The Plaintiff and the Defendants hereby consent to the entry of this Consent Judgment.

CARROLL COUNTY

BY: /s/ .
TITLE: Chief of Staff .
DATE: 7/7/06 .

DEPARTMENT OF THE ENVIRONMENT

BY: /s/
TITLE: Director, Water Mgmt. Admin.
DATE: 7/11/06

Dated and entered this 25th day of July 2006:

/s/
Judge, Circuit Court for Carroll County

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE PINEY RUN
PRESERVATION ASSOCIATION

Plaintiff

v.

COUNTY COMMISSIONERS
OF CARROLL COUNTY

Defendant

Civil Action No.: AMD06CV3019

Entered January 8, 2007

DEFENDANT'S MOTION TO DISMISS

Defendants County Commissioners of Carroll County, by their undersigned counsel, move to dismiss the complaint for lack of subject matter jurisdiction, and in support of their motion attach the following Memorandum of Law, which is incorporated as if fully set forth herein.

WHEREFORE, Defendants County Commissioners of Carroll County respectfully request that the Court dismiss Plaintiffs Complaint with prejudice.

Respectfully submitted,

/s/ Linda S. Woolf .

Linda S. Woolf (Federal Bar No. 08424)
K. Nichole Nesbitt (Federal Bar No. 26137)
Goodell, DeVries, Leech & Dann, LLP
One South Street, 20th Floor
Baltimore, Maryland 21202
(410) 783-4000
Attorney for Defendant County Commissioners of Carroll County

this case originally was issued in 1990 and sets forth various limitations on the characteristics of the Plant's treated wastewater (also called "effluent"). (Ex. 2, Permit No. 88-DP-0594). As originally issued, the Permit contained no limitations with regard to temperature. (Id.). Following a challenge by various landowners (several of whom are members of the Plaintiff Association),[10] however, MDE introduced an effluent limitation for temperature into the Permit and issued notices of its determination. (Ex. 4, Notice of Final Determination). Both the County and the landowners challenged MDE's Notice of Final Determination, and a contested case hearing was held in the Office of Administrative Hearings in the summer of 2001.

At the contested case hearing, the parties introduced extensive evidence concerning the operation of the Plant and the characteristics and condition of the Piney Run. (Ex. 5, Nov. 15, 2001 Proposed Order by *ALJ).* The parties stipulated that, between 1993 and 2001, the Plant had made certain improvements to its operating system intended to, among other things, minimize the effect of

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[10] Upon the challenge by the landowners, a contested case hearing was held and the matter proceeded through the Baltimore County Circuit Court and into the Court of Special Appeals, which remanded the matter back to MDE for a determination of certain specific factual issues. (Ex. 3, August 17, 2998 Opinion of Court of Special Appeals, Woodward v. Maryland Department of the Environment, Case No. 1660 (Sept. Term 1997)

environmental factors on the stream. (Id. at 8-9). The evidence demonstrated that the Plant's effluent generally did not exceed the greater of 20°C or the ambient temperature of the stream throughout most of the year, but on certain occasions "during the periods of the hottest weather when solar radiation and the air temperature become significant warming factors on the stream itself," the effluent exceeded this criteria by "as much as 2 degrees C," usually in the evening hours. (Id. at 12-13). Nonetheless, the evidence was undisputed that flow from the Plant actually had a moderating effect on the temperature of the stream, which was beneficial to the trout population. (Id. at 35). A habitat assessment performed just prior to the hearing demonstrated that the Piney Run contains abundant numbers of trout, as well as aquatic and plant species that are beneficial to the propagation of trout. (Id. at 13-14). The ALJ ultimately determined that the Plant's discharge, even in the absence of any temperature limitation, had no adverse biological impact on the stream. (Id. at 35). Nonetheless, the ALJ upheld the introduction of the temperature limitation, and MDE's Final Decision Maker concurred. (Ex. 6, MDE's Nov. 18, 2003 Final Decision and Order). MDE issued the new permit - with the temperature limitation in place - on January 21, 2004. (Ex. 7, Permit No. 88-DP-0594C).

B. The County's Application for an Alternate Effluent Limit

On July 9, 2004, Carroll County submitted an application for an alternate effluent limit, pursuant to the water quality regulations, along with a Study

Plan for Alternate Effluent Limitation for review by MDE. (Ex. 1, Aff. of James Slater at ¶¶ 23-24). The applicable regulation regarding alternate effluent limits provides as follows:

> Thermal discharge effluent limitations or standards established in permits may be less stringent than those required by applicable standards and limitations if the discharger demonstrates to the satisfaction of the Department that the effluent limitations or standards are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which discharge is made.

COMAR 26.08.03.03E(1). Given MDE's findings concerning the health of the stream and its community of fish and wildlife even in the absence of any temperature limit, the County sought a less stringent temperature restriction and prepared several extensive studies of the biological and physical conditions of the stream to support its application. (Ex. 1, Aff. of James E. Slater at ¶¶ 24-36). The study process included extensive temperature data collection and modeling of the thermal characteristics of the stream and a multi-phase biological and habitat study, based on a field research program with a number of components. (Id.).

As of this date, the County has met all of MDE's deadlines associated with its alternate

effluent limit study. On December 21, 2005, the County submitted its Final Report in connection with its Study Plan to MDE and it has provided all additional information requested by MDE by way of a supplemental report in connection with its application. MDE has not yet completed its review of the County's application for an alternate effluent limit. (Id. at ¶ 25).

C. MDE's Enforcement Action and the Stay of Enforcement

While its application for an alternate effluent limit was pending, the County petitioned for judicial review of MDE's Final Decision and moved to stay enforcement of the Permit pending the outcome of the appellate process. (Ex. 9, County's May 25, 2004 Motion to Stay). Thereafter, MDE filed a Complaint for Injunctive Relief and Civil Penalties against the County for violating the new temperature limit in the Permit. (Ex. 10, Complaint, State of Maryland Department of the Environment v. County Commissioners of Carroll County, Case No. 06-C-04-041610 (the "Enforcement Action")). The Circuit Court for Carroll County denied the County's petition for judicial review but granted its motion to stay and ordered that enforcement of the Permit would be stayed until the first to occur of a final decision of the case or November 20, 2005. (Ex. 11, Nov. 23, 2004 Order of Hon. J. Barry Hughes). Given the Circuit Court's stay of enforcement of the Permit and the fact that the County had noted an appeal to the Court of Special Appeals, MDE and the County jointly moved to stay the Enforcement Action until the Circuit Court's stay of the Permit

was lifted. (Ex. 12, Dec. 20, 2004 Joint Motion to Stay). The court granted the joint motion. (Ex. 13, Jan. 25, 2005 Order Staying Enforcement Action). Pursuant to the Circuit Court's November 23, 2004 Order, during the duration of the stay, the County continued to operate the Plant in full compliance with its prior NPDES Permit, which did not contain a temperature limitation. (Ex. 1, Aff. of James Slater at ¶ 7).

D. The Consent Judgment Entered in the Enforcement Action

The stay of enforcement granted by the Circuit Court for Carroll County expired on November 20, 2005 and the Permit became effective on that date. (Ex. 8, Aff. of David Lyons[11] at ¶ 2). By that time, the County's request for an alternate effluent limit was proceeding through the MDE review process. On or about July 11, 2006, Carroll County and MDE entered into a Consent Judgment in the Enforcement Action, which reflected their agreement as to appropriate long-term and interim measures to ensure compliance with the Permit. (Id. at ¶ 3). The Consent Judgment reflects the parties' agreement in full settlement of the Enforcement Action, as provided in Rule 2-612, Maryland Rules of Procedure. (Id.). The Consent Judgment was

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[11] Mr. Lyons is the Division Chief of the Water Management Administration Compliance Program at MDE. He is responsible for enforcement of the terms, conditions, limitations and requirements of State and NPDES Discharge Permits and has been involved in the enforcement activities with regard to the County. (Ex. 8, Aff. of David Lyons at ¶ 1)

entered by the Circuit Court for Carroll County on July 25, 2006. (Ex. 14, Consent Judgment).

The Consent Judgment imposes stipulated civil penalties of $500 for each day that the County fails to comply with any temperature effluent limit of the Permit or fails to meet any requirement or complete any work, plan, or report, or adhere to a milestone date or schedule required by the Consent Judgment. Pursuant to this provision, MDE made written demand upon the County for stipulated penalties (and the County paid the stipulated penalties) for each day that it failed to comply with the temperature effluent limit of the Permit prior to the entry of the Consent Judgment. The County has made a total payment in the amount of $13,500 for such stipulated penalties. (Ex. 8, Aff. of David Lyons at ¶¶ 4-6).

The Consent Judgment provides that, in light of the County's application for an alternate effluent limit and its implementation of an alternate effluent limit study, stipulated penalties would automatically begin to accrue on the day after performance is due or the day a violation occurs, whichever is applicable, and will continue to accrue if MDE approves an alternate effluent limit and MDE's approval of the limit is challenged. However, if the final judgment, if any, approves the alternate effluent limit, then such penalties for events that do not exceed the alternate effluent limit will not be assessed or due and payable to MDE. If MDE or a final judgment does not approve the alternate effluent limit, then stipulated penalties from the effective date of the Permit to the date of the final

judgment shall be due and payable within 30 days of such final judgment. (Id. at ¶ 7; Ex. 14, Consent Judgment).

In addition to the provisions regarding penalties, the Consent Judgment required the County to design and implement a multi-phase Environmental Project ("EP") to mitigate any water temperature increases caused by storm water run-off or modifications to stream buffers in the Piney Run watershed. The EP required the County to submit a Study Plan and Schedule for evaluating the thermal effects of storm water released into the Piney Run within the County by July 1, 2006 and, within 30 days of the Department's approval of the Study Plan, to began in evaluation of the Storm Water Management ("SWM") facilities upstream or in the vicinity of the Plant and the thermal effects of the storm water discharged from those facilities into the Piney Run. The County was required to complete the collection of SWM facility based thermal data no later than September 30, 2006. The County was required to submit, no later than December 15, 2006, a storm water temperature remediation plan based on the findings of the SWM evaluation, an implementation schedule for the remediation plan and a budget. The County has met all of these SWM temperature remediation milestone dates under the EP. (Ex. 8, Aff. of David Lyons at ¶¶ 8-9).

The Consent Judgment also required the County, during the 2006 planting season, to survey and evaluate the status of the riparian buffers from the headwaters of the Piney Run to a location downstream in Baltimore County, to plant and establish a riparian buffer on its property where

there is none, to enhance any existing buffer with supplemental plant stock, and to place the riparian buffer under a conservation easement. By August 1, 2006, the County was required to submit a plan to MDE for establishing an effective riparian buffer on its property. By September 1, 2006, the County was required to submit a plan for establishing a riparian buffer or purchasing easements for establishing a riparian buffer on privately-owned property along the Piney Run from its headwaters to Trenton Road. The County has met these milestone dates for the enhancement of the existing riparian buffer and the establishment of additional riparian buffers along the Piney Run. (Id. at 110).

The Consent Judgment requires the County to submit quarterly progress reports to MDE describing the significant activities and work completed. Beginning on July 1, 2006, and at the end of every quarter thereafter until the completion of the EP, the County is required to submit documentation of all expenditures incurred in connection with the EP, certifying that all cost information provided to MDE is complete and accurate and represents a fair estimate of the costs necessary to implement the EP. The County is also required to certify that, except for the requirement to perform the EP pursuant to the Consent Judgment, the County was not required to perform the EP by any federal, state, or local law or regulation. The County has complied with this quarterly reporting requirement since July 1, 2006. (IA at ¶ 11).

Additionally, the Consent Judgment requires the County to submit, within 30 days after the completion of the EP, a completion report containing a detailed description of the EP as implemented, documentation of expenditures made in connection with the EP, including an itemized list of all eligible EP costs, certification that EP has been fully implemented, and a description of the environmental benefits resulting from the implementation of the EP. (Id. at ¶ 12). This deadline has not yet occurred.

Absent the requirements of the Consent Judgment, the County would not be required to perform any aspect of the EP, including the enhancement of the existing riparian buffer in Carroll County, the establishment of an effective riparian buffer downstream in Baltimore County or the monitoring and remediation of the thermal impact of storm flow from the SWM facilities in Carroll County. (Ex. 1, Aff. of James Slater at ¶ 38). MDE believes, however, that implementation of the EP will result in significant environmental benefits in the Piney Run watershed, including a significant alleviation of any thermal impacts on the stream. (Ex. 8, Aff. of David Lyons at ¶ 13).

The County already has expended significant amounts of money to improve the condition of the stream, both prior to the Enforcement action and in implementing the EP as required by the Consent Judgment. In 1998-99, the County spent $250,000 to remove an 800-foot concrete channel and construct a natural channel above and below the Plant, create a riparian buffer, and retrofit three SWM facilities upstream of the Plant. (Ex. 1, Aff. of

James Slater at ¶ 21). The expenditures associated with the application for an alternate effluent limit have, to date, totaled $189,814.38. (Id. at ¶ 36). The health of the stream has benefited significantly by this action, as shown through numerous studies. (Id. at ¶¶ 31 -35).

MDE and the County used the same kind of holistic approach in reaching the terms of the Consent Judgment. Under the terms of the Consent Judgment, and, specifically the EP, the County has performed an assessment of the thermal impact of the upstream storm water discharge. The temperature loggers and software required for the assessment cost $1,878, and a total of $57,450 was paid to EA, the County's consultant, during the period from June through January 8, 2006 to support their efforts in assisting the County in this effort. The County has submitted a proposed plan to retrofit SWM facilities upstream of the Plant that will significantly reduce the thermal load on the stream, with a projected cost of $355,000. It has proposed a buffer enhancement plan for the land along the stream within the County that would cost an additional $24,000. It has also submitted a proposed plan to establish riparian buffers or obtain conservation easements on private land in Baltimore County that could entail significant additional expenditures. (Ex. 1, Aff. of James Slater at ¶¶ 37-45 and Project Table attached as exhibit B thereto).

Notwithstanding MDE's Enforcement Action and the extensive corrective and beneficial environmental activity resulting from it, Plaintiff brought its citizen's suit on December 4, 2006.

III. STANDARD OF REVIEW FOR THE JURISDICTIONAL DETERMINATION IN THIS CASE

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a complaint should be dismissed if the court lacks subject matter jurisdiction over the action. FED. R. Civ. P. 12(b)(1). When a defendant challenges subject matter jurisdiction, "the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999). "The district court should grant the 12(b)(1) motion to dismiss 'if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.'" Community of Cambridge Environmental Health and Community Dev. Group v. City of Cambridge, 115 F. Supp. 2d 550, 553 (D. Md. 2000) (quoting Evans, 166 F.3d at 647)).

IV. ARGUMENT

The provision of the Clean Water Act under which Plaintiff has brought this action provides that "[n]o action may be commenced under subsection (a)(1) of this section... if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with the standard, limitation, or order" that the plaintiff alleges was violated. 33 U.S.C. § 1365(b)(1)(B). "This provision is a necessary precondition for the court's jurisdiction," and "[t]he

Plaintiffs have the burden of proving that [the State agency's] prosecution is not diligent" in order to defeat a motion to dismiss. City of Cambridge, 115 F. Supp. 2d at 554; see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49, 64, 108 S. Ct. 376 (1987). "This burden is a heavy one because diligence on the part of the enforcement agency is presumed." City of Cambridge, 115 F. Supp. 2d at 554 (quoting Friends of the Earth, Inc. v. Laidlaw Envir. Servs., Inc., 890 F. Supp. 470,487 (D.S.C. 1995).

The purpose of the statute is to ensure that citizen suits do not play a "potentially intrusive" role in enforcement of the environmental laws; it is important to preserve the "government agency's discretion to act in the public interest." Arkansas "Wildlife Federation v. ICI Americas. Inc., 29 F.3d 376, 380 (8th Cir. 1994). Thus, citizen suits are only appropriate where federal and state authorities appear "unwilling to act." Lockett v. Environmental Protection Agency, 319 F.3d 678, 684 (5th Cir. 2003) (quoting North and South Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 555 (1st Cir. 1992)). "Duplicative enforcement actions add little or nothing to compliance actions already underway, but do divert State resources away from remedying violations in order to focus on the duplicative effort." Scituate, 949 F.2d at 556.

Here, MDE's Enforcement Action against the County and the terms of the resulting Consent Judgment undisputedly constitute diligent prosecution, such that Plaintiff's cause of action is jurisdictionally barred.

A. Plaintiff Cannot Establish a Lack of Diligent Prosecution

The issue this court must determine is "whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative civilian action." Arkansas Wildlife Federation v. ICI Americas. Inc., 29 F.3d 376, 381 (8th Cir. 1994). Thus, there are three issues: (1) whether MDE has taken corrective action; (2) whether MDE is diligently pursuing the corrective action; and (3) whether the action seeks to remedy the same violations as the civilian action. Id., All three factors mandate dismissal in this case.

1. MDE has taken corrective action in this case.

MDE filed the Enforcement Action more than two years before Plaintiff filed suit. The Enforcement Action sought injunctive relief and civil penalties against the County for discharging wastewater "with temperatures higher than permitted by the NPDES Permit issued by the State of Maryland for discharges to State waters." (Ex. 10, Enforcement Action Complaint). It encompassed violations from June 2004 "continuing to the present." (Id.). The Action was stayed by court order until November 2005, at which time MDE and the County began the process of determining the best manner to address the temperature limit violations. This process culminated in an extensive Consent Judgment through which MDE has required the County to engage in the following action:

- pay civil penalties of $500 for each day that the County fails to comply with, any temperature effluent limit;

- design and implement an Environmental Project ("EP") to mitigate any water temperature increases caused by factors other than Plant discharge;

- submit a Study Plan and Schedule for evaluating the thermal effects of storm water released into the Piney Run within the County;

- evaluate the Storm Water Management ("SWM") facilities upstream or in the vicinity of the Plant and the thermal effects of the storm water discharged from those facilities into the Piney Run;

- submit a storm water temperature remediation plan based on the findings of the SWM evaluation;

- survey and evaluate the status of the riparian buffers from the headwaters of the Piney Run to a location downstream in Baltimore County, in order to further address thermal aspects of the stream;

- plant and establish a riparian buffer on County-owned property where mere is none;

- enhance any existing buffer on County-owned property with supplemental plant stock;

- place the riparian buffer under a conservation easement;

- design and implement a plan for establishing riparian buffers or obtaining conservation easements on properties owned by private landowners in Baltimore County;

- submit documentation on a quarterly basis of progress made, problems encountered and all expenditures incurred in connection with the EP; and

- submit, within 30 days after the completion of the EP, a completion report containing a detailed description of the EP as implemented, documentation of expenditures made in connection with the EP, certification that the EP has been fully implemented, and a description of the environmental benefits resulting from the implementation of the EP.

(Ex. 14, Consent Judgment; Ex. 8, Aff. of David Lyons at ¶¶ 7-12). All of these actions were designed to address the effects of thermal discharge into the Piney Run. (Id.). Without question, MDE took corrective action against the County.

2. MDE is diligently pursuing the corrective action.

The Consent Judgment requires continued involvement of both the County and MDE to pursue the corrective action. The County is required to report on a quarterly basis to MDE with regard to the progress of implementing the EP and the costs associated with its activities. It has submitted timely quarterly reports since the execution of the Consent Judgment. (Ex. 1, Aff. of James Slater at ¶ 48; Ex. 8, Aff. of David Lyons at ¶ 11). While the County engages in these environmental improvement activities, MDE continues to assess penalties against the County for each day the County is in violation of its permit. The County has made a total payment in the amount of $13,500 for such stipulated penalties. (Ex. 8, Aff. of David Lyons at ¶ 6).

Although the County is seeking an alternate effluent limit (AEL) that would change the temperature restriction, the stipulated penalties continue to accrue while the application is being considered. If MDE does not approve the AEL, the stipulated penalties become due and payable within 30 days of the final judgment. If MDE approves the AEL but that approval is challenged, stipulated penalties continue to accrue until the time of a final

judgment. Assessment of penalties will only cease if a final judgment is entered approving the AEL and then only to the extent that past or future violations do not exceed the AEL. (Id. at ¶ 7).

In addition to assessing the stipulated penalties, MDE has required the County to spend significant resources implementing the EP. The County has paid nearly $2,000 for equipment and over $57,000 to its research consultants. The SWM retrofit project is predicted to cost an additional $355,000. The County will spend an estimated $24,000 to complete a buffer enhancement plan in the Carroll County portion of the stream in spring 2007. It may incur significant additional expense in connection with the establishment of riparian buffers/conservation easements in Baltimore County, although this will depend on the willingness of private landowners, including members of the Plaintiff association, to participate in-this project. (Ex. 1, Project Table attached to Aff. of James E. Slater)

It is clear from a comparison with other cases that MDE's action meets the threshold of diligent prosecution. In City of Cambridge, for example, this Court held that the threshold had been met when MDE:

> brought a judicial, rather than administrative action; it sought and obtained a monetary penalty from the City, though minimal; it limited future connections to the sewer system; and it has required, reviewed, and approved the

> planning, development, and construction of a new system to eliminate wastewater problems and alleviate unauthorized discharges.

115 F. Supp. 2d at 556. Similarly, in Scituate, the state agency required the municipality to submit monthly, weekly, and daily test results from monitoring wells, spend close to one million dollars planning a new treatment facility, and enforce a sewer hookup moratorium. 949 F.2d at 557.

Here, MDE has required the County to pay stipulated penalties for violating its permit, conduct comprehensive studies on the thermal impact of other discharges into the stream, engage in extensive remedial activity to address temperature concerns, and meet strict reporting requirements. The County is expected to spend more than $435,000 to meet MDE's requirements and is diligently working to comply with the terms of the Consent Judgment. Absent the Consent Order, the County would not be required to do any of this investigatory and remedial work, and the stream would not see the resulting improvement.

It cannot be said that MDE's efforts in pursuing the County have been "dilatory, collusive or otherwise in bad faith" as would defeat the presumption of diligence. See Connecticut Fund for the Environment v. Contract Plating Co., 631 F. Supp. 1291, 1293 (D. Conn. 1986) ("The court must presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of [illegible]ct in its

Americas Inc., 842 F. Supp. 1140, 1147 (E.D. Ark. 1993). The Court should refrain from "circumscrib[ing] the administrator's discretion to implement a plan that, in his expert judgment, adequately addresses a violation." Id. (quoting North and South Rivers Watershed Ass'n v. Town of Scituate. 755 F. Supp. 484, 486-87 (D. Mass. 1991); see also Arkansas Wildlife Federation v. ICI Americas. Inc., 29 F.3d 376, 380 (8th Cir. 1994) ("courts must afford appropriate deference to the expertise of the agency enforcing the state's environmental laws.").

Here, Plaintiffs concern about the thermal impact of the County's discharge into the Piney Run is being addressed comprehensively by MDE, the State agency charged with the responsibility of enforcing the Clean Water Act's requirements. In fact, the Court of Special Appeals has already determined that deference is due to MDE in its handling of this very Permit. The court expressly relied on the "expertise of the agency" to affirm MDE's final decision with regard to the temperature limit in the Permit. (Ex. 15, Jan. 17, 2006 Order, County Comm'rs of Carroll County v. Rowland, No. 2338, Sept. Term 2004, at p. 13).

Deference to MDE is particularly appropriate in light of the pendency of the County's request for an alternate effluent limit Maryland's water quality regulations specifically allow MDE to tailor a temperature limit to a particular discharger's effluent so that the discharger is not faced with unnecessarily onerous restrictions as long as it can ensure that the health of the stream will not be

impacted adversely. The County has worked with MDE for a number of years to address the thermal and other qualities of the stream, and both MDE and the County have determined through extensive studying of the stream that taking a holistic approach - such as by addressing the riparian buffer and stormwater contributions — has had a far greater benefit to the aquatic life than any mechanical process would have. If the Court allows this case to proceed, the AEL process will stall and the proven, successful approach currently being taken will have to terminate in favor of installation of environmentally-unfriendly and completely unwarranted mechanical chillers. This Court should defer to MDE's expertise in this area and allow it to continue its enforcement of the County's current permit and its evaluation of the AEL, as MDE is in the most appropriate position to do both.

V. CONCLUSION

Because MDE has engaged in action calculated to address any violations by the County of the temperature limits in its Permit, Plaintiffs action is barred and this Court lacks jurisdiction over this case. Accordingly, the Complaint should be dismissed with prejudice. Alternatively, judgment should be entered in favor of the County.

Respectfully submitted,

/s/ Linda S. Woolf .

Linda S. Woolf (Federal Bar No. 08424)
K. Nichole Nesbitt (Federal Bar No. 26137)
Goodell, DeVries, Leech & Dann, LLP
One South Street, 20th Floor
Baltimore, Maryland 21202
(410) 783-4000
Attorney for Defendant County Commissioners of Carroll County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of January, 2007, a copy of Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, Memorandum of Law in support thereof, proposed Order and Notice of Filing of Lengthy Exhibits was sent electronically to:

G. Macy Nelson
Suite 803
401 Washington Avenue
Towson, Maryland 21204
Attorney for Plaintiff

/s/ K. Nichole Nesbitt

K. Nichole Nesbitt

ENTERED NOVEMBER 14, 2006

IN THE UNITED STATES DISCTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

The Piney Run Preservation
Association
3423 Black Rock Road
Upperco, Maryland 21155

Plaintiff

Civil Action No.
AMD06CV3019

v.

County Commissioners of
Carroll County
225 North Center Street
Westminster, Maryland 21157
Serve on:
Julia W. Gouge, President
225 North Center Street
Westminster, Maryland 21157

COMPLAINT FOR CIVIL FINES
AND INJUNCTIVE RELIEF

The Piney Run Preservation Association, by its attorney, G. Macy Nelson, files this Complaint against the County Commissioners of Carroll County (the "Defendant") and alleges:

1. This a citizen's suit, brought under § 505 of the Clean Water Act (the "Act"), 33 U.S.C. § 1365, for the Defendant's violation of the terms of

the National Pollutant Discharge Elimination System ("NPDES") Permit No. MD0022446 / State Discharge Permit 88-DP-0594 ("Permit") (attached hereto as Exhibit A).

Jurisdiction

2. This court has subject matter jurisdiction over the claims set forth in this Complaint, by virtue of § 505(a)(1) of the Act, 33 U.S.C. § 1365(a)(1), and 28 U.S.C.§ 1331.

3. On August 25,2006, Plaintiff gave notice of the Defendant's violations of the Act and its intent to file suit via letter ("Notice Letter") to Franklin G. Schaeffer, Deputy Directory of Utilities, Carroll County Department of Public Works; Joseph Curran Esq., Maryland Attorney General; Kendl Philbrick, Maryland Department of the Environment ("MDE"); Julia George, County Commissioners of Carroll County; Kimberly Millender, Esq., Office of the County Attorney; Nancy Young, Esq., Assistant Attorney General for MDE; Steven Johnson, United States Environmental Protection Agency ("EPA"); and Steven Field, Esq., EPA, as required by § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) *(see* Notice Letter attached hereto as Exhibit B).

4. Over sixty days have passed since the Plaintiff gave notice to the Defendant, and neither the EPA nor MDE has commenced to diligently prosecute a court action to address the violations.

5. Venue is appropriate in the United States District Court for the Northern District of

Maryland pursuant to § 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), because the source of the violations complained of is located in this district.

Parties

6. Plaintiff, The Piney Run Preservation Association, is a non-profit association whose purposes include the protection of the Piney Run stream in Baltimore County. Piney Run is a trout stream with its headwaters near the border of Carroll County and Baltimore County. MDE has classified Piney Run as a trout stream and given it a designation of Class IIIP. Piney Run leads to the Loch Raven Reservoir and is also classified as a stream to be protected as a source of drinking water.

7. Members of The Piney Run Preservation Association reside in Baltimore County in the vicinity of the Piney Run stream. They recreate on or near, and otherwise use and enjoy, Piney Run and the water systems of which it is part. The quality of Piney Run and the waters of the state of Maryland directly affects the agricultural, health, recreation, aesthetic, property, and/or environmental interests of the members of The Piney Run Preservation Association. The interests of The Piney Run Preservation Association's members have been, are being, and will be adversely affected by the failure of the Defendant to comply with its NPDES Permit requirements.

8. The Defendant, Commissioners of Carroll County, is a county in Maryland.

General Allegations

9. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from a point source into a navigable waters of the United States, except as allowed by an NPDES permit.

10. A discharge is any "addition" of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A).

11. The term "pollutant" includes substances such as municipal 'waste, heat, biological materials, sewage, and garbage. 33 U.S.C. § 1362(b).

12. Under § 404(a)-(b) of the Act, 33 U.S.C. § 1342(a)-(b), the Administrator of the EPA has authorized MDE to issue NPDES permits in Maryland.

13. MDE issued to Defendant NPDES Permit No. MD0022446, which authorizes Defendant to discharge from its wastewater treatment plant ("Plant") limited quantities of specified pollutants into Piney Run.

14. Defendant's NPDES Permit prohibits the discharge of effluent warmer than the higher of 68° F or the ambient temperature of the stream.

15. Defendant discharges effluent warmer than the higher of 68° F or the ambient temperature of the stream.

16. The continued addition of effluent warmer than the higher of 68° F or the ambient temperature of the stream violates the Clean Water Act.

17. The discharge of effluent in excess of the Permit limits, which occurs during the warm weather months, has occurred in the past, is occurring now, and will continue to occur in the future.

18. A separate violation occurs on each day in which Carroll County discharges heated effluent warmer than the higher of 68° F or the ambient temperature of the stream

19. Defendant's discharge of heat degrades the water quality of Piney Run.

20. Defendant has violated the terms of the Clean Water Act and of its Permit.

21. As a result of these violations, on July 25, 2006, MDE and Carroll County entered into a consent judgment that purportedly requires Carroll County to comply with its permit's thermal effluent limitations. However, the consent judgment does not constitute diligent prosecution of Carroll County's violations of the Clean Water Act.

Relief Requested

WHEREFORE, The Piney Run Preservation Association respectfully requests this Court to grant the following relief:

22. Enjoin the County Commissioners of Carroll County from operating the Plant in such a manner that would result in further violations of the Defendant's NPDES Permit;

23. Order the County Commissioners of Carroll County to pay civil penalties for each day the Defendant violated the terms of its NPDES Permit pursuant to §§ 309(d) and 505(a) of the Act, 33 U.S.C. § 1319(d) and 1365(a);

24. Award costs to The Piney Run Preservation Association, including reasonable attorney, witness, and consultant fees, as authorized by § 505(d) of the Act, 33 U.S.C. 1365(d); and

25. Award such other relief as this Court deems appropriate.

Respectfully submitted,

/s/

G. Macy Nelson
410 Washington Avenue
Suite 803
Towson, Maryland 21214
410.296.8166 x290
Bar Number: 02993

MARYLAND DEPARTMENT OF THE ENVIRONMENT

1800 Washington Boulevard • Baltimore MD 21230
410-537-3000 • 1-800-633-6101

Robert L. Ehrlich. Jr.
Governor

Kendl P. Philbrick
Acting Secretary

Michael S. Steele
Lt. Governor

JAN 21 2004

CERTIFIED MAIL

Mr. Douglas E. Myers, Director
Department of Public Works
225 N. Center Street, Room 200
Westminster, Maryland 21157-5194

Re: Modification of State Discharge Permit 88-DP-0594C and NPDES Permit MD0022446 for the Hampstead WWTP

Dear Mr. Myers:

The Department of the Environment is forwarding your modified NPDES/State Discharge Permit. The modified permit authorizes a flow increase from 500,000 gallons per day (gpd) to the design flow of 900,000 gpd.

The effective date for the modification is February 1, 2004. All limitations and / or conditions not affected by the modification remain as specified in the original issuance of the permit.

If you have any questions concerning the modification, please contact Jagdish C. Chawla, Surface Discharge Permits Division, at (410) 537-3676.

Sincerely,

/s/

Robert M. Summers, Director
Water Management Administration

Enclosures:
cc: Mr. Charles Zeleski, Director Carroll County Environmental Health
Mr. G. Macy Nelson
Ms. Victoria Woodward

RECEIVED JAN 29 2004

EXHIBIT A

MARYLAND DEPARTMENT OF THE ENVIRONMENT

1800 Washington Boulevard • Baltimore MD 21230
410-537-3000 • 1-800-633-6101

Robert L. Ehrlich. Jr.
Governor

Kendl P. Philbrick
Acting Secretary

Michael S. Steele
Lt. Governor

DISCHARGE PERMIT

Effective Date of
Modification: February 1, 2004

State Discharge
Permit Number: 88-DP-0594C

NPDES
Permit Number: MD0022446

Effective
Date: March 1, 1990

Expiration
Date: February 28,1995 *

Pursuant to the provisions of Title 9 of the Environment Article, Annotated Code of Maryland, and regulations promulgated thereunder, and the provisions of the Clean Water Act 33 U.S.C. Section 1251 et seq., and implementing regulations 40 CFR Parts 122, 123, 124 and 125, the Department of the Environment hereby establishes conditions and

requirements pertinent to the wastewater treatment plant and collection system and authorizes:

Carroll County Bureau of Utilities
125 North Court Street, Suite 105
Westminster, Maryland 21157

TO DISCHARGE FROM:
Hampstead Wastewater Treatment Plant

LOCATED AT:
4455 North Woods Trail
Hampstead, Carroll County, Maryland

THROUGH OUTFALL:
001 - Facility Effluent

TO: Piney Run, which is protected as natural trout waters and for public water supply in accordance with the following special and general conditions and a map incorporated herein and made a part hereof.

* The expired permit will remain in effect until the renewal permit is issued.

I. DEFINITIONS

A. "Bypass" means the intentional diversion of pollutants from any portion of a treatment.

B. "BODs" (Biochemical Oxygen Demand) means the amount of oxygen consumed in a standard BODs test without the use of a nitrification inhibitor at 20 degree centigrade on an unfiltered sample.

C. "Clean Water Act" means the Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1251 et. seq.

D. "CFR" means the Code of Federal Regulations.

E. "COMAR" means the Code of Maryland Regulations.

F. "Composite sample" means a combination of individual samples obtained at hourly or smaller intervals over a time period. Either the volume of each individual sample is proportional to discharge flow rates or the sampling interval (for constant volume samples) is proportional to the flow rates over the time period used to produce the composite.

G. "Grab sample" means an individual sample collected in less than 15 minutes.

H. "Department" means the Maryland Department of the Environment.

I. "Measured flow" means any method of liquid volume measurement, the accuracy of which has been previously demonstrated in engineering practice, or for which a relationship to absolute volume has been obtained.

J. "Minimum or maximum value" means the lowest or highest value measured.

K. "Monthly average discharge" means the total mass (and concentration, if appropriate) of all daily discharges sampled and/or measured during a calendar month divided by the number of daily discharges sampled and/or measured during such month.

L. "Monthly log mean" (monthly geometric mean) means the logarithmic or geometric mean of all samples taken in the calendar month.

M. "Nondetectable level for total residual chlorine, due to limitations in measurement technology" means a residual concentration of less than 0.10 mg/l.

N. "Outfall XXX" means a sampling location in outfall line XXX downstream from the last addition point or as otherwise specified.

O. "POTW" means a publicly owned treatment works.

P. "Significant Industrial User (SIU)" is defined as any industrial user (IU) that:

1. is subject to national categorical standards; and

2. any other IU that:

a. discharges an average of 25,000 gallons per day or more of process wastewater (excluding sanitary, non-contact cooling and boiler blowdown wastewater); or

b. contributes a process wastestream that makes up 5% or more of the average dry weather hydraulic or organic capacity of the POTW; or

c. is designated as such by the POTW on the basis that the IU has a reasonable potential for

adversely affecting the POTW's operation or for violating any pretreatment standard or requirement; or

d. is found by the POTW, the Department, or the Environmental Protection Agency . (EPA) to have significant impact either individually or in combination with other contributing industries to the POTW, on the quality of the sludge, the POTW's effluent quality, or air emissions generated by the system.

Q. "TSS" (Total Suspended Solids) means the residue retained on the filter by an analysis done in accordance with Standard Methods or other approved methods.

R. "TKN" (Total Kjeldahl Nitrogen) means organic nitrogen plus ammonia nitrogen.

S. "Weekly average" means the highest weekly average of the month, calculated by dividing the total mass (and concentration, if appropriate) for each

week by the number of samples collected and measured that week.

T. "NPDES" (National Pollutant Discharge Elimination System) means the national system for issuing permits as designated by the Clean Water Act

U. "Ambient Temperature" means the temperature of the surface water measured in Piney Run at the closest practicable monitoring location in the stream upstream from the concrete culvert and apron, approximately 30 feet above the discharge point.

V. "Effluent Temperature" means the temperature of the discharge measured at outfall 001.

II. SPECIAL CONDITIONS,

A. Effluent Limitations, Outfall 001- see footnotes (1)(2)

The quality of the effluent discharged by the facility shall be limited at all times as shown below.

Effluent Characteristics	Monthly Loading Rate	Weekly Loading Rate	Daily Loading Rate	Monthly Average	Weekly Average	Daily Maximum
	Kg/d/ (lbs/d)	Kg/d/ (lbs/d)	Kg/d/ (lbs/d)	mg/l	mg/l	mg/l
BOD_5 (5/1-9/30)	68 (150)	100 (230)	N/A	20	30	N/A
(10/1-4/30)	100 (230)	150 (340)	N/A	30	45	N/A
TSS	100 (230)	150 (340)	N/A	30	45	N/A
NH_3-N(5/1-9/30)	3.4 (7.5)	N/A	6.8 (15)	1.0	N/A	2.0
(10/1-4/30)	6.8 (15)	N/A	14(30)	2.0	N/A	4.0
Total P	1.0 (2.3)	1.5 (3.4)	N/A	0.3	0.45	N/A

Effluent Characteristics	Maximum	Minimum
Fecal Coliforms	200 MPN/100ml Monthly log mean Value.	N/A
Total Residual Chlorine	The use of chlorine or chlorine containing compounds in the treatment of wastewater is prohibited.	6.0 mg/l at any time.
Dissolved Oxygen	N/A	6.5
pH	8.5	
Temperature	The maximum temperature at the outfall may not exceed 68 degrees F (20 degrees C) Or the ambient temperature of the surface water, whichever is greater (see page 5).	

(1) When this permit is renewed, the new limitations may not be equal to the above limitations. The discharge of toxic substances not shown shall in toxic amounts, as determined by the Department, is prohibited.

(2) There shall be no discharge of floating solids or visible foam other than trace amount.

A flow of0.90 mgd (900,000 gpd) was used in waste allocation calculations. Notification to be provided to the Department at least 180 days before the flow is expected to exceed this flow.

II. SPECIAL CONDITIONS, Continued

B. Monitoring Requirements, Outfall 001-see footnotes (1)(2)(3)(4)

The effluent characteristics established in Special Condition II.A. shall be monitored as follows:

Measurement Effluent Characteristics	Sample Frequency	Type
BOD_5	2x week	8 hr. composite
Total Suspended Solids	2x week	8 hr. composite
Total Phosphorus	2x week	8 hr. composite
Ortho Phosphorous +	1x month	24hr. composite
Ammonia Nitrogen	2x week	8hr. composite
Nitrate + Nitrate (1) (Nitrogen)	1x Month	24hr. composite
Organic Nitrogen (1)	1x Month	24hr.composite
Fecal Coliform	1x week	Grab
Dissolved Oxygen	2x Day	Grab
pH	2x Day	Grab
Effluent Temperature (2)		Grab
Ambient Temperature (see definition I.U)(3)		Grab
Flow	Continuous	Recorded

(1) Monitor only-parameters shall be reported on the monthly operating report as individual results and on the Discharge Monitoring Report (EPA Form 3320-1) as a monthly average concentration and monthly average loading value. All nitrogen parameters shall be measured on the same daily sample.

(2) Effluent temperature will be measured at least every hour on a 24-hour basis. The effluent will be measured at Outfall 00I with an instrument meeting the appropriate standard in 40CFR Part 136 and accurate to at least 0.1° C.

(3) Because of daily, seasonal and interannual variation in temperatures, no single or seasonal or default value can be used to characterize ambient temperature. Therefore ambient temperatures will be measured at the closest practicable monitoring location in the stream upstream from the concrete culvert and apron. approximately 30 feet above the discharge point.

(4) Temperature Reporting and Determination of Compliance

Ambient and outfall temperatures will be measured and compared daily. For compliance purposes, the comparison will be made using a statistical test to determine if differences between the effluent and ambient temperature are significant. This method allows compliance to be determined with a specified level of certainty. The 95% certainty level will be used with a "one-tailed" test. If

the maximum effluent temperature measurement for any day is greater than 200° C, then the 24 effluent and ambient temperatures for that day will be compared using a +-test at the confidence level of alpha = 0.05. If the calculated t value is greater than *t* 0.05, and the average effluent temperature is greater than the average ambient temperature for the day, the effluent will be non-compliant for that day.

The maximum effluent temperature for every day, +-test results, and the average effluent and ambient temperatures for the days requiring *t-tests* will be submitted each month with the Discharge Monitoring Reports. Complete records of the ambient and effluent temperature measurements will be available to the Department upon request.

II. SPECIAL CONDITIONS, Continued

C. SCHEDULE OF COMPLIANCE

The permittee shall achieve compliance with the preceding discharge limitations on the effective date of the permit.

D. PREREATMENT PROGRAM

The permittee shall be subject to the following requirements in order to assure that POTW pass-through and interference from industrial discharges into the sanitary sewer do not occur.

(1) The Department shall periodically review the permittee's Sewer Use Ordinance to assure that it affords the POTW adequate authority to regulate its significant industrial users, including, but not limited to the authorities required under 40 CFR Part 403.8(f)(1).

(2) The permittee shall modify its Sewer Use Ordinance per the results of the Department Ordinance review, as required by section D(l), above.

(3) The pennitte shall draft permits for R.W. Sauder, Inc.(formerly Maryland Fresh Eggs) and Dalib

Inc.(formerly Bauerlein Meats, Inc.) and submit them to the Department for review prior to renewal or modification by the permittee.

(4) Prior to allowing a significant industrial user to discharge to the POTW regulated by his permit, the permittee shall notify Department in writing, as follows:

(a) For significant non-categorical industrial users, at the discretion of the Department, the permittee shall either issue a permit or enter into an agreement which describes the responsibilities of the significant industrial user to assure that the quality of its discharge to the POTW will not cause interference or pass-through or otherwise violate State and Federal pretreatment requirements as defined in COMAR 26.08.08 and CFR Part 403. All permits and agreements between the permittee and significant

industrial users shall be subject to approval by the Department prior to issuance.

(b) For industrial users subject to Federal categorical standards:

(i) The permittee shall notify the Department, in writing, of the intent of an industrial user potentially subject to Federal categorical standards to discharge process wastewaters into the POTW.

(ii) The Department, after being notified of the categorical industrial user's intent to discharge process wastewaters to the POTW, shall notify the industry and/or the permittee (in the case where the Department independently

determines that an industrial user plans to locate in the sewer service area of the POTW), in writing, and shall draft a permit based on the applicable Federal Categorical Standards. Upon review by the permittee and the categorical industrial user the permit shall be issued by the Department.

(5) The permittee shall perform monitoring of all significant industrial users at least once per year to determine compliance with pretreatment requirements and standards.

(6) The Department shall be responsible for the issuance of a discharge permit to, periodic inspection and monitoring of and taking enforcement action against Ridge Engineering, Inc. for any non-compliance with pretreatment requirements and standards in the Department's issued permit.

(7) The permittee shall enforce all requirements of permits issued to its industrial users including, but not limited to, discharge limitations, sampling requirements, and reporting requirements.

(8) Annually, on or before the fifteenth day of February, the permittee shall submit to the Department a list of all significant industrial users within the entire service area which discharge to the POTW regulated by this permit. Information on this list shall include the legal name of the industry, street address, flow, type of wastewater being discharged into the sanitary sewer, contact and telephone number. The report shall also include a listing of the dates and results of any SIU inspections, SIU monitoring activities, and enforcement actions against SIU's. The report shall cover the period from January 1 through December 31 of the previous year.

(9) The permittee shall send the Department a copy of all notices of violation and other

enforcement actions taken against its significant industrial users.

E. BIOMONITORING PROGRAM

1. Within three months of the effective date of the permit, the pennittee shall submit to the Department for approval a study plan to evaluate wastewater toxicity at Outfall 001 by using biomonitoring. The study plan should include a discussion of:

   a. wastewater and production variability

   b. sampling methods

   c. source of test organisms

   d. source of dilution water

   e. testing procedures

   f. data analysis

   g. quality control

   h. testing schedule

2. The testing program shall consist of two acute testing events, three months apart. This testing shall

be initiated no later than three months following the Department's acceptance of the study plan.

a. Each of the two testing events shall include a 48-hour static renewal test using fathead minnow and a 48-hour static renewal test using a daphnid species.

b. If the receiving water is estuarine the permittee shall substitute estuarine species for those species specified above. Approved estuarine species for acute testing are sheepshead minnows, silversides, grass shrimp and mysid shrimp. In all cases, testing must include one vertebrate species and one invertebrate species.

3. The samples used for biomonitoring shall be collected at the same time and location as the samples used for the chemical analysis required for this outfall. For chlorinated effluents, samples shall be collected after dechlorination.

4. Testing shall be conducted in accordance with the procedures described in Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms, Fifth Edition, EPA-821 – R – 02 - 012, October 2002

5. Test results shall be submitted to the Department within one month of completion of each set of tests.

6. Test results shall be reported in accordance with the Department's "Reporting Requirements for Effluent Biomonitoring Data" (3/21/03).

7. If testing is not performed in accordance with the Department-approved study plan, additional testing may be required by the Department.

8. If the test results indicate that the effluent is toxic, additional biomonitoring or a toxicity reduction evaluation will be required by the Department.

9. If plant processes or operations change so that there is a significant change in the nature

of the wastewater, the Department may require the permittee to conduct a new set of tests.

10. If a significant industrial user locates within the service area so that significant change in the nature of the wastewater might be anticipated, the Department may require the permittee to conduct a new set of tests.

11. Submit all Biomonitoring related materials to:

Maryland Department of the Environment
Water Management Administration
Compliance Program
Montgomery Park Business Center
1800 Washington Boulevard, STE 425
Baltimore, Maryland 21230-1708

F. TOXIC CHEMICAL TESTING

1. Concurrent with the biomonitoring study plan, the permittee shall submit to the Department for approval, a study plan to perform analytical testing for toxic chemicals.

2. The toxic chemical testing study plan shall include a description of:

a. sampling methods;

b. analytical methods;

c. practical detection levels; and

d. quality control procedures.

3. Concurrently with the first toxicity test, the permittee shall perform analytical testing for the toxic chemicals identified in the Department's "Toxic Substance Analytical Protocol" (7/92).

4. Toxic chemical testing shall be performed in accordance with 40 CFR Part 136 and the Department-approved toxic chemical testing plan.

5. Substances other than those identified in Section 3 above may be detected in the effluent. If so, the permittee shall identify and quantify the ten present in highest concentration.

6. Testing results shall be submitted to the Department with the results of the first toxicity test.

7. Toxic chemical testing results shall be reported in accordance with the Department's "Reporting Requirements for Priority Pollutant Analytical Data".

8. If testing is not performed in accordance with the Department's approved study plan, additional testing may be required by the Department.

9. Submit all toxic chemical testing related materials to:

Maryland Department of the Environment
Water Management Administration
Compliance Program
Pretreatment Data
Montgomery Park Business Center
1800 Washington Boulevard, STE 425
Baltimore, Maryland 21230-1708

G. TOXICITY REDUCTION EVALUATION (TRE)

The permittee shall conduct a Toxicity Reduction Evaluation (TRE) when a review of toxicity test data by the Department indicates unacceptable acute or chronic effluent toxicity. A TRE is an investigation conducted to identify the causative agents of effluent toxicity, isolate the source(s), determine

the effectiveness of control options, implement the necessary control measures and then confirm the reduction in toxicity.

1. Within 90 days of notification by the Department that a TRE is required, the permittee shall submit a plan of study and schedule for conducting a TRE. The permittee shall conduct the TRE study consistent with the submitted plan and schedule.

2. This plan should follow the framework presented in Toxicity Reduction Evaluation Protocol for Municipal Wastewater Treatment Plants (EPA/833B-99/002) August 1999.

3. Beginning 60 days from the date of the Department's acceptance of the TRE study plan and every 60 days thereafter, the permittee shall submit progress reports including all relevant test data to the Department. This shall continue until completion of the toxicity reduction confirmation.

4. Within 60 days of completion of the toxicity identification, or the source identification phase of the TRE, the permittee shall submit

to the Department a plan and schedule for implementing those measures necessary to eliminate acute toxicity and/or reduce chronic toxicity to acceptable levels. The implementation of these measures shall begin immediately upon submission of this plan.

5. Within 60 days of completing the implementation of the control measures to eliminate or reduce toxicity, the permittee shall submit to the Department, for approval, a study plan to confirm the elimination or reduction of toxicity using biomonitoring.

6. If, for any reason, the implemented measures do not result in compliance with the Department's toxicity limitations, the permittee shall continue the TRE.

7. Submit all TRE-related materials to:

Maryland Department of the Environment
Technical and Regulatory Services Administration
Environmental Health & Risk Assessment Program
Montgomery Park Business Center
1800 Washington Boulevard, STE 540
Baltimore, MD. 21230-1718

III. GENERAL CONDITIONS

A. Monitoring and Reporting

1. Representative Sampling

Samples and measurements shall be taken at times that arc representative of the quantity and quality of the discharge, and at evenly spaced intervals.

2. Monthly Monitoring Results

a. Discharge Monitoring Reports

Monitoring results obtained each month shall be summarized on a Discharge Monitoring Report form (EPA No. 3320-1). Reports shall be submitted to the Department postmarked no later than the 28th of the month following the reporting month. Duplicate signed copies of these reports shall be submitted to:

Maryland Department of the Environment
Water Management Administration
Compliance Program
Montgomery Park Business Center
1800 Washington Boulevard, STE 425
Baltimore, MD. 21230-1708

b. Monthly Operating Reports

The permittee shall submit monthly operating reports on a form supplied or approved by the Inspection and Compliance Program. Reports shall be submitted to the Inspection and Compliance Program postmarked no later than the 28th day of the month following the reporting month

3. Sampling and Analysis Methods

Analytical and sampling methods shall conform to test procedures for the analysis of pollutants as identified in 40 CFR Part 136 - "Guidelines Establishing Test Procedures for the Analysis of Pollutants."

4. Monitoring Equipment Maintenance

a. The permittee shall calibrate and maintain all monitoring and analytical instrumentation to ensure accuracy of measurements.

b. Environment Article, Section 9-343 provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than six months per violation, or by both.

5. Recording of Results

For each measurement or sample taken pursuant to the requirements of the permit, the permittee shall record the following information:

a. the date, exact place and time of sampling or measurement;

b. the person(s) who performed the sampling or measurement.

c. the dates analyses were performed;

d. the person(s) who performed each analysis;

e. the analytical techniques or methods used; and

f. the results of such analyses.

6. Additional Monitoring by Permittee

If the permittee monitors any pollutant at the location(s) designated herein more frequently than required by this permit, using approved analytical methods as specified above, the results of such monitoring shall be included in the calculation and reporting of the values required in the Discharge Monitoring Report form (EPA No. 3320-1). The increased frequency shall also be reported. The results of any other monitoring performed by the permittee shall be made

available to the Department upon request.

7. Record Retention

All data used to complete the permit application and all records and information resulting from the monitoring activities required by this permit, including all records of sampling and analyses performed, calibration and maintenance of instrumentation and recordings from continuous monitoring instruments, shall be retained for a minimum of three years. This period shall be extended automatically during the course of litigation or when requested by the Department.

B. General Requirements

1. Permit Noncompliance Notification Requirements

All discharges authorized herein shall be consistent with the terms and conditions of his permit. The discharge of any pollutant not identified in this permit, or of any pollutant identified in this permit at a level in excess of that authorized shall

constitute a violation of this permit. If, for any reason, the permittee does not comply with or will be unable to comply with any permit condition, the permittee shall, within 24 hours, notify the Department by telephone at (410) 537-3510 during work hours or at (866) 633-4686 during evenings, weekends, and holidays. The permittee shall provide the Department with the following information in writing within five days of such oral notification.

a. a description of the noncomplying discharge including its impact upon the receiving waters;

b. cause of noncompliance;

c. the duration of the period of noncompliance and the anticipated time the condition of noncompliance is expected to continue;

d. steps taken by the permittee to reduce and eliminate the noncomplying discharge;

e. steps to be taken by the permittee to prevent recurrence of the condition of noncompliance;

f. a description of the accelerated or additional monitoring to determine the nature and impact of the noncomplying discharge; and

g. the results of the monitoring described in f. above.

2. Change in Discharge

The permittee shall report any anticipated facility expansions, production increases, or process modifications which will result in new, different or an increased discharge of pollutants by submitting a new application at least 180 days prior to the commencement of the changed discharge or, if such changes will not violate the effluent limitations specified in this permit, by providing prior written notice to the Department. Following such notice, the permit may be modified by the Department to specify and limit

any pollutants not previously limited.

3. Facility Operation and Quality Control

All waste collection, control, treatment and disposal facilities shall be operated in a manner consistent with the following:

a. Facilities shall be operated efficiently to minimize upsets and discharges of excessive pollutants.

b. The permittee shall provide an adequate operating staff qualified to carry out operation, maintenance and testing functions required to ensure compliance with this permit. Superintendents and operators must be certified by the Board of Waterworks and Waste Systems Operators located at 1800 Washington Boulevard, Baltimore, Maryland 21230 in accordance with Title 12 of Environmental Article,

Annotated Code of Maryland.

c. Facility maintenance work which adversely affects or may adversely affect the discharge quality shall be scheduled during non-critical water quality periods. The permittee shall follow the reporting procedures listed in General Condition 111.B.7 of this permit, Noncompliance Notification.

4. Adverse Impact

The permittee shall take all reasonable steps to minimize any adverse impact to waters of this State, human health or the environment resulting from noncompliance with any effluent limitations specified in this permit, and must perform accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge.

5. Bypassing

Any bypass of treatment facilities is prohibited unless the bypass does not cause any violations of the effluent limitations specified in Special Condition 11.A. and is for essential maintenance to assure efficient operation, or unless the permittee can prove that:

a. the bypass is unavoidable to prevent loss of life, personal injury, or substantial physical damage to property, damage to the treatment facilities which would cause them to become inoperable, or substantial and permanent loss of natural resources; and

b. there are no feasible alternatives to the bypass; and

c. the Department receives notification pursuant to General Condition 11.B.1. above. Where the need for a bypass is known (or should have been known) in advance, this

notification shall be submitted to the Department for approval at least ten days before the date of the bypass or at the earliest possible date if the period of advance knowledge is less than ten days; and

d. the bypass is allowed under conditions determined by the Department to be necessary to minimize adverse effects.

6. Sewage Sludge Requirements

The permittee shall comply with all existing State and federal laws and regulations that apply to sewage sludge monitoring requirements and utilization practices, and with any regulations promulgated pursuant to Environment Article, Section 9-230 et seq. or to the Clean Water Act, Section 405 (d). The permittee is responsible for ensuring that its sewage sludge is utilized in accordance with a valid sewage sludge utilization permit issued by the Department.

7. Power Failure

The permittee shall maintain compliance with the effluent limitations and all other terms and conditions of this permit in the event of a reduction, loss or failure of the primary source of power to the wastewater collection and treatment facilities.

8. Right of Entry

The permittee shall allow the Secretary of the Department, the Regional Administrator of the Environmental Protection Agency, and their authorized representatives, upon the presentation of credentials to enter upon the permittee's premises and:

a. to have access to and to copy any records required to be kept under the terms and conditions of this permit;

b. to inspect any monitoring equipment or monitoring method required in this permit;

c. to inspect any collection, treatment, pollution management, or discharge facilities required under this permit; or

d. to sample any discharge of pollutants.

9. Property Rights/Compliance With Other Requirements

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property, invasion of personal rights, or any infringement of federal, State or local laws or regulations.

10. Reports and Information

a. Upon request, the permittee shall provide to the Department, within a reasonable time, copies of records required to be kept by this permit. The permittee shall also furnish to the Department, within a reasonable time, any information which the

Department may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit; or to determine compliance with this permit.

b. All applications, reports or information submitted to the Department shall be signed and certified as required by COMAR 26.08.04.01 and 40 CFR 122.22.

c. Except for data determined to be confidential under COMAR 26.08.04.01,all data shall be available for public inspection at the Department and the Office of the Regional Administrator of the Environmental Protection Agency. Effluent data shall not be considered confidential.

d. Environment Article, Section 9-343 provides that any person who knowingly makes any false statement, representation,

or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance, shall upon conviction be punished by a fine of not more than $10,000 or by imprisonment for not more than six months or by both.

11. Transfer of Ownership or Control

In the event of any change in ownership or control of facilities from which the authorized discharge emanates, the permit may be transferred automatically to another person only if:

a. the current permittee notifies the Department, in writing, of the proposed transfer at least 30 days prior to the proposed transfer date;

b. the notice includes a written agreement between the existing and new permittees containing

the specific date of proposed transfer of permit coverage, and of responsibilities and liabilities under the permit; and

c. neither the current permittee nor the new permittee receive notification from the Department, within 30 days of the Department's receipt of the agreement, of its intent to modify, revoke, reissue or terminate the existing permit. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in paragraph 4(b) above.

12. New Effluent Standards

This permit shall be revoked and reissued or modified to meet any effluent standard, water quality standard or prohibition established under the Environment Article, the Clean Water Act, or regulations promulgated thereto, and the permittees shall be so notified.

13. Industrial Users

The permittee shall require all industrial users of the wastewater treatment facility to comply with user charges as established by the permittee, pursuant to Section 9-326(a)(i) of the Environment Article.

14. Noncompliance

Nothing in this permit shall be construed to preclude the institution of any legal action for noncompliance with State, federal or local laws and regulations.

15. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action against the permittee or to relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Clean Water Act or under the Environment Article.

16. Waterway Construction and Obstruction

The permit does not authorize the construction or placing of physical structures, facilities, debris, or the undertaking of related activities in any waters of this State including the 100 year flood plain.

17. Construction Permit

This permit is not a permit to construct. For a new facility, in order to make this permit valid, a construction permit shall be obtained to meet the requirements of COMAR 26.03.12.03(A) and Environment Article, Section 9-204(d).

18. Severability

If any provision of this permit shall be held invalid for any reason, the remaining provisions shall remain in full force and effect, and such invalid provisions shall be considered severed and deleted from this permit.

C. Permit Expiration, Modification, or Revocation

1. Expiration of Permit

This permit and the authorization to discharge shall expire at midnight on the expiration date of the permit unless permittee has submitted a timely and complete reapplication pursuant to Section 111.C.2 below.

2. Reapplication for a Permit

At least 180 days before the expiration date of this permit, unless permission for a later date has been granted by the Department, the permittee shall submit anew application for a permit or notify the Department of the intent to cease discharging by the expiration date. In the event that a timely and complete reapplication has been submitted and the Department is unable, through no fault of the permittee, to issue a new permit before the expiration date of this permit, the terms and conditions of this permit continue and remain fully effective and enforceable.

3. Permit Modification - Request of Permittee

A permit may be modified by the Department upon the written request of the permittee and after notice and opportunity for a public hearing in accordance with the provisions set forth in COMAR 26.08.04.10.

4. Permit Modification, Suspension, Revocation - Violation of Laws

A permit may also be modified, suspended or revoked by the Department, in the event of a violation of the terms or conditions of the permit, or of State or federal laws and regulations and in accordance with the provisions set forth in COMAR.

D. Wastewater Collection System

Discharges from the sewer collection system are not authorized. Should a discharge occur, the permittee shall report it in accordance with the Notification Requirements set forth in Section III, General Condition B.1. However, the written reports on the overflows shall be submitted monthly with the Discharge Monitoring Reports

(DMRs), unless the Department specifically requests the report to be submitted within 5 days after the permittee becomes aware of the overflow. A copy of any 5 day report should also be submitted with the monthly DMRs.

IV. CIVIL AND CRIMINAL PENALTIES

1. Civil Penalties for Violations of Permit Conditions

   In addition to civil penalties for violations of State water pollution control laws set forth in Section 9-342 of the Environment Article, Annotated Code of Maryland, the Clean Water Act provides that any person who violates Section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act or in a permit issued under Section 404 of the Act, is subject to a civil penalty not to exceed $25,000 per day for each violation.

2. Criminal Penalties for Violations of Permit Conditions

In addition to criminal penalties for violations of State water pollution control laws set forth in Section 9-343 of the Environment Article, Annotated Code of Maryland, the Clean Water Act provides that:

a. any person who negligently violates Section 301, 302, 306, 307, 308, 318, or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, or in a permit issued under Section 404 of the Act, is subject to a fme of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both.

b. any person who knowingly violates Section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, or in a permit issued

under Section 404 of the Act, is subject to a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than three years, or by both.

c. any person who knowingly violates Section 301, 302, 306, 307, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, or in a permit issued under Section 404 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, is subject to a fine of not more than $250,000 or imprisonment of not more than fifteen years, or both.

d. any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be

maintained under the Act or who knowingly falsifies, tampers with or renders inaccurate any monitoring device or method required to be maintained under the Act, is subject to a fine of not more than $10,000 or by imprisonment for not more than two years, or by both.

3. DUTY TO PROVIDE INFORMATION

The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the Director, upon request, copies of records required to be kept by this permit.

4. SIGNATORY REQUIREMENTS

All applications, reports, or information submitted to the Director shall be signed and certified as required by 40 CFR 122.22.

V. MAP SHOWING DISCHARGE POINT LOCATION

[MAP RETAINED IN ORIGINAL EXHIBIT]

VI. NPDES PROGRAM

On September 5, 1974, the Administrator of the U.S. Environmental Protection Agency approved the proposal submitted by the State of Maryland for the operation of a permit program for wastewater discharges pursuant to Section 402 of the Clean Water Act.

Pursuant to the aforementioned approval, this discharge permit is both a State of Maryland discharge permit and an NPDES permit.

/s/

Robert M. Summers, Director
Water Management Administration

TELEPHONE
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August 25,2006

SENT VIA: Certified Mail, Return Receipt Requested

Franklin G. Schaeffer
Deputy Director of Utilities
Carroll County Department of Public Works
225 North Center Street
Westminster, Maryland 21157

RE: *Hampstead Waste Water Treatment Plant*

Dear Mr. Shaeffer:

Section 505(b) of the Clean Water Act (the "Act"), 33 U.S.C. Section § 1365(b), requires that sixty days prior to the filing of a citizen's suit in Federal District Court under Section 505(b) of the Act, the alleged violator, the Environmental

Protection Agency, and the State in which the alleged violation occurred be given notice of the alleged violation.

> The Piney Run Preservation Association hereby places you on notice that it believes that the Carroll County Bureau of Utilities ("Carroll County") has violated and continues to violate the terms of its NPDES permit (permit MD0022446) ("Permit") by discharging into the Piney Run stream treated effluent warmer than the higher of 68° F or the ambient temperature of the stream.

Under the discharge provisions of the Clean Water Act, no pollutant may be discharged into the waters of the nation unless that discharge is allowed by a NPDES permit. 33 U.S.C. § 1311(a). A discharge is any "addition" of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). Thus, a violation occurs when five elements are met: "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) from (5) a *point source.*" *National Wildlife Federation v. Consumers Power Co.,* 862 F.2d 580, 583 (6th Cir. 1988). The term "pollutant" is defined in 33 U.S.C. § 1362(6): it "means... heat..." Thus, the first element is met.

The second element is that the pollutant is "added" to the waters. The EPA has interpreted the term "added" to mean "the introduction of a pollutant to water from the outside world." *National Wildlife,* 862 F.2d at 584. Municipal waste is "clearly introduced from the outside world." *Id.* at 586. The effluent from the Plant was never Piney Run water,

and, under the Clean Water Act, every component of that effluent, including heat, is an addition to Piney Run.

The Plant's discharge pipe is a point source from which the effluent passes into navigable waters, and the Plant thus satisfies the last three elements. The Plant's channel is also a point source.

The Permit that MDE issued to Carroll County, which became effective on November 20, 2005, prohibits the discharge of effluent warmer than the higher of 68° F or the ambient temperature of the stream. Thus, the continued addition of effluent warmer than both 68° F and the ambient temperature of the stream violates the Clean Water Act. A separate violation occurs on each day in which Carroll County discharges heated effluent warmer than both 68° F and the ambient temperature of the stream. The violations are occurring now and will continue in the future.

As a result of these violations, on July 25, 2006, MDE and Carroll County entered into a consent judgment that purportedly requires Carroll County to comply with its permit's thermal effluent limitations. However, the consent judgment does not constitute diligent prosecution of Carroll County's violations of the Clean Water Act.

Very Truly Yours,

/s/

G. Macy Nelson

GMN:ro

cc: J. Joseph Curran., Esq.
Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202

Kendl P. Philbrick
Secretary
Maryland Department of the Environment
1800 Washington Boulevard
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County Commissioners of Carroll County
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3RC20
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Note to Hampstead WWTP File

Bill Limpert 8/13/04

I received a call from Jim Slater. He advised that the county wants to request a consent order with MDE regarding temperature discharge from the plant. County attorney Linda Wolf will be calling MDE attorney Nancy Young today regarding this issue. Jim advised that the ambient logger has been moved to the correct upstream location at this time, and they are collecting data. Steve Nelson is working on the statistical tests. He stated that temperature monitoring as required by the permit is very difficult, and, the county is having difficulty finding a vendor who can guarantee that they can set up the system. They need time to implement the system, and to reduce effluent temperatures during warm months. They have considered chillers or underground heat exchangers to reduce effluent temperature, but each has specific problems and expense.

Jim admitted that the county is in violation. About 1 month ago they applied for a permit modification to ease the temperature requirements, but have not heard back from MDE.

EXHIBIT F

Sec. 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to

assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

Sec. 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Sec. 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either

(A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or

(B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to

the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of

approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)

(A) To issue permits which apply, and insure compliance with, all applicable

requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after

consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of

> (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants,
>
> (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or

(C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

Sec. 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a

designated and approved management agency under section 1288 of this title.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean

> (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or
>
> (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the

degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means

(A) any addition of any pollutant to navigable waters from any point source,

(B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants

> (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and
>
> (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of "Division D—Manufacturing" and such other classes of

significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) Coastal recreation waters.--

(A) In general.--The term "coastal recreation waters" means--

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 1313(c) of this title by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) Exclusions.--The term "coastal recreation waters" does not include--

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) Floatable material.--

(A) In general.--The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) Inclusions.--The term "floatable material" includes--

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) Pathogen indicator.--The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

33 U.S.C.A. § 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or

equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means

(1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title;

(2) an effluent limitation or other limitation under section 1311 or 1312 of this title;

(3) standard of performance under section 1316 of this title;

(4) prohibition, effluent standard or pretreatment standards under section 1317 of this title;

(5) certification under section 1341 of this title;

(6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or

(7) a regulation under section 1345(d) of this title,. [FN1]

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

CODE OF MARYLAND REGULATIONS
TITLE 26 DEPARTMENT OF THE ENVIRONMENT
SUBTITLE 08 WATER POLLUTION
CHAPTER 02 WATER QUALITY
Complete through Maryland Register Vol. 35, Issue 13,
dated June 20, 2008.

.02 Designated Uses.

* * *

B. Specific Designated Uses.

(1) Use I: Water Contact Recreation, and Protection of Nontidal Warmwater Aquatic Life. This use designation includes waters that are suitable for:

(a) Water contact sports;

(b) Play and leisure time activities where individuals may come in direct contact with the surface water;

(c) Fishing;

(d) The growth and propagation of fish (other than trout), other aquatic life, and wildlife;

(e) Agricultural water supply; and

(f) Industrial water supply.

(2) Use I-P: Water Contact Recreation, Protection of Aquatic Life, and Public Water Supply. This use designation includes:

(a) All uses identified for Use I; and

(b) Use as a public water supply.

(3) Use II: Support of Estuarine and Marine Aquatic Life and Shellfish Harvesting. This use designation includes all applicable uses identified for Use I in:

(a) All tidally influenced waters of the Chesapeake Bay and tributaries, the Coastal Bays, and the Atlantic Ocean to the 3-mile boundary; and

(b) Tidally influenced waters that are or have the potential for:

(i) Shellfish propagation and storage, or harvest for marketing purposes; and

(ii) Actual or potential areas for the harvesting of oysters, soft-shell clams, hard-shell clams, and brackish water clams.

(4) Use II-P: Tidal Fresh Water Estuary. This use designation includes:

(a) All uses identified for Use II waters; and

(b) Use as a public water supply.

(5) Use III: Nontidal Cold Water. This use designation includes all uses identified for Use I and waters which have the potential for or are:

(a) Suitable for the growth and propagation of trout; and

(b) Capable of supporting self-sustaining trout populations and their associated food organisms.

(6) Use III-P: Nontidal Cold Water and Public Water Supply. This use designation includes:

(a) All uses identified for Use III waters; and

(b) Use as a public water supply.

(7) Use IV: Recreational Trout Waters. This use designation includes all uses identified for Use I in cold or warm waters that have the potential for or are:

(a) Capable of holding or supporting adult trout for put-and-take fishing; and

(b) Managed as a special fishery by periodic stocking and seasonal catching.

(8) Use IV-P: Recreational Trout Waters and Public Water Supply. This use designation includes:

(a) All uses identified for Use IV waters; and

(b) Use as a public water supply.

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TITLE 26 DEPARTMENT OF THE ENVIRONMENT
SUBTITLE 08 WATER POLLUTION
CHAPTER 02 WATER QUALITY
Complete through Maryland Register Vol. 35, Issue 13,
dated June 20, 2008.

.03-3 Water Quality Criteria Specific to Designated Uses.

* * *

D. Criteria for Use III Waters–Nontidal Cold Water.

(1) Bacteriological–same as Use I waters.

(2) Dissolved Oxygen. The dissolved oxygen concentration may not be less than 5 milligrams/liter at any time, with a minimum daily average of not less than 6 milligrams/liter.

(3) Temperature.

(a) The maximum temperature outside the mixing zone determined in accordance with Regulation .05 of this chapter or COMAR 26.08.03.03-.05 may not exceed 68?F (20?C) or the ambient temperature of the surface waters, whichever is greater.

(b) Ambient temperature–Same as Use I.

(c) A thermal barrier that adversely affects salmonid fish may not be established.

(d) It is the policy of the State that riparian forest buffer adjacent to Use III waters shall be retained whenever possible to maintain the temperatures essential to meeting this criterion.

(4) pH-same as Use I waters.

(5) Turbidity-same as Use I waters.

(6) Color-Same as Use I waters.

(7) Total Residual Chlorine (TRC). Except as provided in COMAR 26.08.03.06, the Department may not issue a permit allowing the use of chlorine or chlorine-containing compounds in the treatment of wastewaters discharging to Use III and Use III-P waters.

(8) Toxic Substance Criteria. All toxic substance criteria to protect:

(a) Fresh water aquatic organisms apply; and

(b) The wholesomeness of fish for human consumption apply.

* * *

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(2)

No. 08-96

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

THE PINEY RUN
PRESERVATION ASSOCIATION,

Petitioner,

v.

COUNTY COMMISSIONERS OF
CARROLL COUNTY, MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

The Petition arises from the Fourth Circuit's decision in *The Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland*, No. 07-1348, published at 523 F.3d 453 (2008).[1] Affirming the lower court's decision, the Fourth Circuit held that Petitioner "failed to meet its high burden of establishing that the [Maryland Department of the Environment ("MDE")] enforcement action does not satisfy" the Clean Water Act's "diligent prosecution" standard under 33 U.S.C. § 1365. (13a.) The Fourth Circuit found that, unable to meet this standard, Petitioner is barred from bringing a separate citizen lawsuit to enforce the permit issued by MDE to Respondent, Carroll County, Maryland. (*Id.*)

While Petitioner offers the conclusory assertion that the case presents "an important federal question" appropriate for Supreme Court review, the relevant authorities and case-specific facts show otherwise. *See* Sup. Ct. R. 10. The published decisions of several other federal appellate courts plainly support the Fourth Circuit's lengthy, well-reasoned opinion.[2] There is no

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[1] This is Appellant's second request for Supreme Court review of a Fourth Circuit decision in this protracted litigation. The Court denied the prior request. *See The Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland*, 535 U.S. 1077, 122 S. Ct. 1960 (2002).

[2] The Fourth Circuit's opinion appears at page 1a of the Appendix of the Petition for Writ of Certiorari. References in this Opposition to the Fourth Circuit's opinion are made pursuant to the page numbers in the Petitioner's appendix.

split in authority among the federal appellate courts over what constitutes a government agency's "diligent prosecution" of violations of the Clean Water Act. In accord with Supreme Court jurisprudence, courts are unanimous that they should show deference to the decisions made by government agencies exercising their delegated authority to enforce environmental laws, especially where the agency is already substantively addressing the same alleged violation that a private citizen wants remedied. The courts repeatedly recognize that private citizen suits are highly disfavored because they carry tremendous potential to disrupt and impede the government's efforts to protect the environment. That is precisely the situation Petitioner seeks to create here and will continue to create if its petition for certiorari is granted. Because no writ of certiorari is warranted here, the Petition should be denied.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Since 1975, Respondent Carroll County, Maryland, (the "County") has operated the Hampstead Waste Water Treatment Plant (the "Plant"). The Plant's discharged water ("effluent"), which has been treated with ultraviolet and biological processes, flows into the Piney Run, a trout stream.

In 2000, MDE introduced a temperature limitation into the Plant's discharge permit. The limitation provides that the Plant's effluent may not exceed the greater of 20°C or the ambient temperature of the stream.

The Plant's effluent does not undergo any mechanical heating process during its treatment. However, the treated water is kept in holding tanks until its discharge, and on the hottest days of the summer months, the sun occasionally causes an increase in the temperature of the treated water, as well as of the stream itself. In the daytime hours, the effluent often has the effect of cooling the solar-heated stream. In the evening hours, however, the temperature of the stream occasionally falls at a faster rate than the temperature of the effluent, which results in occasions on which the effluent temperature slightly exceeds both 20°C and the ambient temperature of the stream.

The only reliable way for the County to ensure that the effluent's temperature *never* rises above 20°C or the ambient temperature of the stream is to install and operate industrial cooling towers next to the stream to chill the effluent before it is discharged. Petitioner has argued strongly in favor of this option in prior phases of litigation between the parties. These cooling towers, however, pose serious environmental problems. The machines are noisy and unsightly, emit potentially harmful vapors, use biocides, and consume enormous amounts of electricity when operating. They would be needed only in the early evening hours on the hottest days of the year, when the demand on Maryland's energy supply is at its peak.

The proposed machinery would also impose a heavy financial burden on the taxpayers of Carroll County. Erecting the cooling towers next to the stream would cost $1.7 Million and further generate an estimated

annual operating cost of $35,000.[3] The machines would sit idle for most of the year, but the County would still need to devote resources to their year-round maintenance and security.

Such an onerous and potentially harmful undertaking would not to be justified by the environmental ramifications of the Plant's discharge. While Petitioner has argued that the occasional difference in temperature between the Plant's effluent and the stream harms the trout population, independent studies of the stream do not support that theory. These studies consistently show that the Piney Run trout population has not been declining, and, in fact, may even *benefit* from the Plant's effluent.[4]

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[3] This figure was calculated using early 2007 energy costs. Considering the rapid increase in energy prices since then, the burden on County taxpayers would now be much greater than originally estimated.

[4] The Fourth Circuit Court of Appeals took note of this point in its decision. (*See* 8a n.4)

> "Interestingly, in affirming the administrative decision to modify the permit, the Maryland Court of Special Appeals noted that the administrative law judge found 'that there was no evidence the Plant's discharge had any adverse effect on the aquatic life that naturally occurring conditions would not have' and that he also indicated that '***the discharge may even have a positive effect on the trout population***.'"

(citing *County Comm'rs of Carroll Cty. v. Rowland*, No. 2338, at 30 (Md. Ct. Spec. App. 2006) (emphasis added)).

Accordingly, in 2004, during the first summer under MDE's new temperature limit, the County, mindful of the lack of evidence of any environmental harm and the extreme environmental and financial burden of strict compliance in summer months (i.e., construction and operation of mechanical cooling towers), applied for an "alternate effluent limit" as contemplated by the Maryland regulations. These regulations allow a discharger to apply for a different temperature (or other) limit where it can demonstrate to MDE's satisfaction that the existing limit is "more stringent than necessary to assure the protection and propagation of a balanced, indigenous community" of fish in the stream. *See* COMAR 26.08.03.03E(1).

While the County's application for an alternate effluent limit was pending, MDE filed a Complaint for Injunctive Relief and Civil Penalties against the County for its violations of the Permit's temperature limitation. In July 2006, MDE and the County entered into a Consent Judgment regarding that action, which captured their binding agreement on the appropriate and environmentally sound interim and long-term measures to achieve the underlying goals of the permit's temperature limit. On July 25, 2006, the Circuit Court for Carroll County entered the Consent Judgment.

Entry of the Consent Judgment immediately placed significant obligations and expenses on the County while MDE continued to study the County's request for an alternate effluent limit and the wisdom of forcing the County to build and operate cooling towers. Most important, the Consent Judgment requires the County to fund a large-scale Environmental Project to

responsibly and holistically address the environmental concerns raised by temperature differences in the stream. At the same time, the County continues to accrue civil penalties for any technical temperature violations. Pursuant to the Consent Judgment, the County must:

- incur civil penalties of $500 for each day that the County fails to comply with any temperature effluent limit;

- design and implement an Environmental Project to mitigate any water temperature increases caused by factors other than Plant discharge;

- submit a Study Plan and Schedule for evaluating the thermal effects of storm water released into the Piney Run within the County;

- evaluate the storm water management facilities upstream or in the vicinity of the Plant and the thermal effects of the storm water discharged from those facilities into the Piney Run;

- submit a storm water temperature remediation plan based on the findings of the storm water management evaluation;

- survey and evaluate the status of the riparian buffers from the headwaters of

the Piney Run to a location downstream in Baltimore County, in order to further address thermal aspects of the stream;

- plant and establish a riparian buffer on County-owned property where there is none;

- enhance any existing buffer on County-owned property with supplemental plant stock;

- place the riparian buffer under a conservation easement;

- design and implement a plan for establishing riparian buffers or obtaining conservation easements on properties owned by private landowners in Baltimore County;

- submit documentation on a quarterly basis of progress made, problems encountered and all expenditures incurred in connection with the Environmental Project;

- submit, within 30 days after the completion of the Environmental Project, a completion report containing a detailed description of the Project as implemented, documentation of expenditures made in connection with it, certification that it has been fully

implemented, and a description of the environmental benefits resulting from its implementation;

- if the request for an alternate effluent limit is not approved, submit, within 30 days of the disapproval, a plan identifying the measures the County will take to ensure compliance with the permit; and

- implement the measures for ensuring compliance with the permit within 300 days if the request for an alternate effluent limit is not approved.

(*See* Consent Judgment 20a – 37a.)

The extensive commitments that the County has made in the Consent Judgment carry a considerable financial cost. Implementation of the Environmental Project alone will cost more than $400,000. (46a – 51a.) MDE retains ultimate control of the decision whether to make any change to the Permit's temperature restrictions or force the County to build the cooling towers near the stream. (24a – 26a.) If MDE ultimately decides that strict compliance with the 2004 permit is environmentally desirable, the County must submit a compliance plan within 30 days and come into compliance (i.e., build the cooling towers) within 300 days. (26a – 27a.) It would also be obligated to pay all civil fines accrued to that point for temperature violations. (*Id.*)

On November 14, 2006, more than two months after the Circuit Court entered the Consent Judgment reached by MDE and the County, Petitioner filed a private citizen suit seeking strict enforcement of the 2004 Permit's effluent temperature provisions. (66a.) Petitioner argued that the federal court had subject matter jurisdiction over its private action addressing the same issue at the heart of the Consent Judgment because the steps taken by MDE did not constitute "diligent prosecution" of the 2004 permit. In essence, Petitioner sought – and still seeks – a ruling that the County must *immediately* erect the effluent cooling towers before MDE determines whether (1) the variation in effluent temperature has any adverse impact on the environment or (2), if any such adverse impact exists, the impact can be cured through natural and environmentally responsible means.

The District Court and Fourth Circuit each briskly rejected Petitioner's arguments and held that the actions taken by MDE easily met the "diligent prosecution" standard.

REASONS FOR DENYING THE PETITION

A. There Is No Split of Authority and the Fourth Circuit's Decision Does Not Conflict with Any Decisions of This Court or the Other Courts of Appeals.

Petitioner acknowledges that there is no split of authority in the federal appellate courts on the issue of what constitutes "diligent prosecution" of purported violations of the Clean Water Act under 33 U.S.C. § 1365(b)(1)(B). Instead, it only alleges that in prior federal appellate cases where the court found the relevant agency had met the "diligent prosecution" standard, the alleged violations had to be cured by a certain fixed date. It then argues that here, merely because MDE has reserved the discretion on when to render its decision on whether effluent temperature limits are environmentally beneficial and appropriate, the Fourth Circuit has somehow erred due to a lack of sufficient guidance from this Court on how to render a sound decision. Relevant case law simply does not support Petitioner's argument.

B. The Fourth Circuit Properly Followed the Well Settled Legal Rule: Environmental Agencies' Decisions on How to Enforce Environmental Protection Laws Are Entitled to Great Deference.

The current standard utilized by the appellate and district courts consistently allows government agencies to exercise their Congressionally-delegated authority to protect the environment while also preserving citizens' rights to file private actions in those rare

instances where government agencies truly fail to do so. *Compare, e.g., Karr v. Hefner*, 475 F.3d 1192 (10th Cir. 2007) (holding "diligent prosecution" standard was met where EPA chose to enter consent decree with only two of nine defendants); *North and South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 555-56 (1st Cir. 1992) (holding "diligent prosecution" standard was met by State Administrative Order despite agency's decision not to assess financial penalty) *with Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage Dist.*, 382 F.3d 743, 752-53 (7th Cir. 2004) (holding 25 year-old stipulation that failed to remedy discharge of untreated sewerage into city's waterways in clear violation of Clean Water Act did not constitute "diligent prosecution" by the agency). The current standards have not created any confusion in the lower courts, nor have they allowed Clean Water Act violations to go unpunished where the government has slept on its enforcement duty.

The Court should not accept Petitioner's invitation to create (and require federal judges to subsequently enforce) novel, inflexible rules that environmental agencies must strictly obey or risk being ensnared in duplicative private citizen lawsuits. Doing so would frustrate Congressional intent, conflict with the traditional deference shown by courts, and substantially interfere with those agencies' efforts to craft environmentally sound, case-specific solutions.

1. Government action to enforce the Clean Water Act is entitled to great deference, making citizen suits appropriate only where the government has categorically failed to act

When analyzing the propriety of private citizen suits under 33 U.S.C. § 1365(b)(1)(B), federal courts have consistently recognized the need for considerable deference to the government agencies enforcing environmental laws. *See North and South Rivers Watershed Ass'n*, 949 F.2d at 555 ("Where an agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored."); *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 2004) ("[C]ourts must afford appropriate deference to the expertise of the agency enforcing the state's environmental laws.").

Federal appellate courts hold that citizen suits are only appropriate "where Federal and State authorities appear unwilling to act," *Lockett v. Environmental Prot. Agency.*, 319 F.3d 678, 684 (5th Cir. 2003) (quoting *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 489 U.S. 49, 61, 108 S. Ct. 376, 383 (1987)), or "when federal, state and local agencies fail to exercise their enforcement responsibility." *Arkansas Wildlife*, 29 F.3d at 380. Therefore, Petitioner, who seeks to open a second case addressing the same violations that are the subject of a current government enforcement action, carries a heavy burden. *See Karr*, 475 F.3d at 1198 ("This burden is heavy, because the enforcement agency's diligence is presumed.") (internal quotations omitted). Judicial review of the Fourth Circuit's decision affirming

dismissal of this citizen suit would necessarily upset this presumption of deference and should be avoided.

Nothing in Petitioner's brief warrants deviation from the presumption of deference. Petitioner's brief does not allege that MDE's chosen enforcement method is "dilatory, collusive or otherwise in bad faith." *See Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986) ("The court must presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive or otherwise in bad faith."). It merely hopes the Court will draw a negative inference from the unremarkable fact that this comprehensive and far-reaching Consent Judgment lacks a fixed date for MDE to make its final decision on the County's request for an alternate effluent limit.

The Fourth Circuit and the trial judge, however, each firmly and properly rejected this argument, which had been articulated below. (*See* 15a-16a (finding "the open-ended nature of the Consent Judgment reflects the fact that the County is lawfully seeking an AEL through the state administrative process" and concluding "[w]ithout legitimate evidence that MDE had no intention of acting responsibly on the County's AEL application, we have no basis to impute an improper motive to MDE in this regard."); 18a (holding as a matter of law that "consent judgment . . . and its implementation come comfortably within the relevant standards of 'diligent prosecution'")).

2. *The need for deference is heightened where the government has entered a binding consent judgment, because citizen suits challenging those agreements interfere with the government's ability to enforce environmental laws*

Certiorari is particularly imprudent here because MDE and the County are bound by the Consent Judgment entered in 2006. Judicial support for private citizen suits after entry of a consent judgment carries tremendous risks. In *Gwaltney*, 489 U.S. at 60-61, 108 S. Ct. at 383, this Court explained why government enforcement actions under the Clean Water Act preclude private lawsuits. Recognizing that entities charged with violations will make binding concessions to the agency that they were otherwise not obligated to make, if such concessions will facilitate final resolution of the matter, the Court observes "[i]f citizens could file suit . . . to seek civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.*

Here, the County has made vast concessions by entering the Consent Judgment. It assumed significant and costly obligations under the Environmental Project so that it would not be compelled to immediately erect the mechanical cooling towers. The County reasonably and rightly expects that it will not have to defend a second Clean Water Act suit that contradicts the Consent Judgment and seeks to compel immediate construction of those same machines. *See Arkansas Wildlife*, 29 F.3d at 380 (stating "[i]t would be

unreasonable and inappropriate to find failure to diligently prosecute simply because . . . a compromise was reached").

The opinions of the federal appellate courts are in accord. The Tenth Circuit explains that "when the EPA chooses to enforce the CWA through a consent decree, failure to defer to its judgment can undermine agency strategy." *Karr*, 475 F.3d at 1197. The *Karr* court recognized that "[i]f a defendant is exposed to a citizen suit whenever the EPA grants it a concession, defendants will have little incentive to negotiate consent decrees." *Id.* These same considerations militate against judicial review of the Fourth Circuit's decision affirming dismissal of Petitioner's citizen suit.

3. Citizen suits are exceptional and highly disfavored because Congress and the federal courts recognize that duplicative lawsuits frequently impede environmental protection efforts

Certiorari of this twice-dismissed citizen suit will not advance any environmental goal of MDE, which is already addressing the precise issue raised by Petitioner's complaint. Federal appellate courts have made this point emphatically. *See North and South Rivers Watershed Ass'n*, 949 F.2d at 556 ("Duplicative enforcement actions add little or nothing to compliance actions already underway, but do divert State resources away from remedying violations in order to focus on the duplicative effort."); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004) ("Second-guessing of the government's assessment of an appropriate remedy . . .

fails to respect the statute's careful distribution of enforcement authority among the federal EPA, the States and private citizens . . . .") *Arkansas Wildlife*, 29 F.3d at 380 (stating "Congress intended citizen suits brought pursuant to 33 U.S.C. § 1365 to play an 'interstitial,' rather than 'potentially intrusive' role") (quoting *Gwaltney*, 489 U.S. at 60-61, 108 S. Ct. at 382-83). Granting certiorari would frustrate Congress's goals as codified in the Clean Water Act and encourage these disfavored lawsuits.

C. This Case Does Not Present Any Important Federal Questions that Warrant Consideration by This Court.

Petitioner characterizes this case as presenting an "important federal question" but fails to substantiate this characterization. There is no split in the circuits on the parameters of Section 1365(b)(1)(B) "diligent prosecution," and Petitioner offers nothing from courts – or even commentators – that suggests anyone is looking for more guidance on the issue. Petitioner proposes no broader rules that the Court could pronounce to guide lower courts on what constitutes "diligent prosecution." While the question is "important" to Petitioner's efforts to keep its case in federal court, it lacks any real importance as contemplated by the drafters of Supreme Court Rule 10. It is unfit for certiorari.

Moreover, Petitioner's brief offers no clue as to how this Court could possibly isolate and set the "parameters of the 'diligent prosecution' bar to citizen suits" in a judicial decision. The *per se* rule implicitly sought here

by Petitioner – that an agency's decision to enter a Consent Judgment lacking certain deadlines automatically authorizes citizens to bring duplicative lawsuits challenging the same conduct – is much more likely to obstruct than assist the government's efforts to protect the environment. *See Gwaltney*, 489 U.S. at 60-61, 108 S. Ct. at 382-83; *North and South Rivers Watershed Ass'n*, 949 F.2d at 556 ("Duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further this goal. They are, in fact, impediments to environmental remedy efforts.").

The proposed rule would undermine the Clean Water Act by authorizing private litigants to get into federal court to seek personal environmental remedies and disrupt the government's carefully negotiated consent judgments without adding any benefit to the environment. *See Ellis*, 390 F.3d at 477 (emphasizing that citizens bringing private CWA claims "seek relief not on their own behalf but on behalf of society as a whole, and accordingly 'personalized' remedies are not a first priority of the Act.").

For Petitioner's argument to gain any traction, the Court must first ignore the profound difference between the facts here and in those cases cited by Petitioner, in which polluters were engaged in an ongoing pattern of environmentally destructive activities. *See Friends of Milwaukee's Rivers*, 382 F.3d at 752-53 (allowing citizen suit where defendant had discharged untreated sewage into waterways for 25 years); *Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1579 (N.D. Ga. 1995)

(finding no "diligent prosecution" where state agency's repeated delays allowed continued unlawful discharge of toxic metals into waterways). Under existing legal standards, federal courts have been – and continue to be – willing to question an agency's diligence where it fails to take any meaningful action to stop an ongoing discharge of contaminants into the environment.

There is no reasonable basis, however, to doubt MDE's diligence where it enters a Consent Judgment that affords it additional time to evaluate whether thermal limits on effluent confer *any* environmental benefit whatsoever. In the absence of any data that the temperature variations in the effluent and the stream have harmed the trout population, MDE's decision to enter a Consent Judgment that requires the County to finance and develop a riparian buffer of undisputed benefit to the trout population, the Piney Run, and the environment as a whole is eminently sound. MDE's decisions are especially entitled to deference where, as here, MDE reserves the right to demand strict compliance with the 2004 Permit's thermal effluent provisions and collect all accrued civil penalties. Petitioner's duplicative citizen suit, by contrast, is short-sighted, environmentally irresponsible, and undermines MDE's diligent efforts to resolve this matter. Its dismissal was proper and does not merit any further review.

CONCLUSION

Petitioner invites the Court to do what it and numerous other federal courts consistently state they should not and will not do: judicially prescribe inflexible agency rules for enforcing environmental laws. Government agencies exercising their delegated authority to protect the environment in good faith should not be exposed to the second-guessing and disruption caused by private citizen lawsuits challenging the same conduct that the agency is already addressing. It is not only burdensome but also jeopardizes environmental protection efforts by compromising the government's authority to craft environmentally sound case-specific solutions to various disputes. For these reasons, Respondent County Commissioners of Carroll County, Maryland, respectfully opposes the Piney Run Preservation Association's Petition for Writ of Certiorari.

Respectfully submitted,

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